83-871

No. .....

In The

Supreme Court of the United States

October Term, 1983

O. S. FOSTER, Sheriff of Roanoke County, Virginia, and ROBERT N. LANDON, Director, Virginia Department of Corrections,

Petitioners,

v.

CHARLES LANKFORD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Was the Test to Determine the Effective Assistance of Counsel Properly Applied to Tactical Decisions Made by Defense Counsel at Respondent's Criminal Trial?

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O. S. Foster, Sheriff of Roanoke County, Virginia, and Terrell Don Hutto, Director, Virginia Department of Corrections, were named Respondents in a habeas corpus action. Foster and the present Director of the Virginia Department of Corrections, Robert N. Landon, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this matter.

I.

OPINIONS BELOW

The report of the United States Magistrate, who conducted the plenary hearing in this matter and recommended dismissal of the habeas corpus petition, is not reported and

is included herein as Appendix A. The Opinion of the United States District Court for the Western District of Virginia, Roanoke Division, which granted habeas relief, is not reported and is included herein as Appendix B. The Opinion of the United States Court of Appeals for the Fourth Circuit, issued August 30, 1983, affirming the District Court, is not reported and is included as Appendix C.

Page references to the state criminal trial transcript will be designated (Cr. Tr. ....), and page references to the transcript of the federal habeas corpus plenary hearing before the United States Magistrate will be designated (H.C. Tr. ....). The appendix of this petition will be referred to as (App. ....).

II.

JURISDICTION

The judgment of the Court of Appeals was entered on August 30, 1983. The jurisdiction of this Court to issue a writ of certiorari in this case is grounded on 28 U.S.C. § 1254 (1).

III.

STATEMENT OF THE CASE

In 1980, respondent was convicted in the Circuit Court of the County of Fairfax,[1] Virginia, of three counts of sodomy committed upon his stepdaughter. Thereafter, having exhausted his available State remedies, he filed a petition for a writ of habeas corpus in the United States District

[1] Although respondent Lankford was convicted in Fairfax County, he was confined at the Roanoke County Jail in the custody of Roanoke County Sheriff O. S. Foster.

Court for the Western District of Virginia, alleging that he had been denied effective assistance of counsel at his trial. He specifically alleged *inter alia* that ineffective assistance resulted from his counsel's failure to (1) request a transcript of his preliminary hearing, (2) ask additional *voir dire* questions of prospective jurors, (3) call character and other witnesses to testify on his behalf, and (4) request more detailed jury instructions. The matter was set for a plenary hearing before the United States Magistrate.

The record of respondent's criminal trial, which was made a part of the evidence at the hearing, revealed that the trial judge had conducted the *voir dire* of prospective jurors in accordance with customary Virginia procedures and that the response of one prospective juror to the questioning led to her being struck for cause. (Cr. Tr. 7.) At the conclusion of the *voir dire*, respondent's counsel indicated to the court that the panel was satisfactory, and he did not seek permission to ask additional questions. (Cr. Tr. 9.)

Testimony at the plenary hearing indicated that the respondent had a prior criminal history but that subsequent to his release from prison he had engaged in community work and had run unsuccessfully for sheriff. Partly as a result of this, witnesses, including a congressman, a pastor, a former sheriff, and a member of a board of supervisors of the county, were available to testify generally as to the character of the respondent. (H.C. Tr. 265, 285-86, 354.) Respondent's counsel, who had begun his practice in 1969, and who was licensed to practice both in Virginia and in the District of Columbia, testified that he had represented clients in approximately 500 criminal cases. (H.C. Tr. 303.) He said that he and the respondent had discussed before trial the possibility of calling character witnesses to testify

and had decided against using them. He said that he felt that such testimony would have no effect upon the jury because of the type of offenses charged and because a jury could believe that he was the "nicest or most hardworking person" but still could have committed the offenses. (H.C. Tr. 322.)

The record of the criminal trial further revealed that at the conclusion of all the evidence instructions were agreed upon which were general in nature and which did not define the elements of the offenses. Respondent's counsel testified at the plenary hearing that he and the respondent had adopted an "all-or-nothing" defense, and that he did not want to either weaken that defense or confuse the jury with other defenses or arguments. (H.C. Tr. 431-32.)

The United States Magistrate recommended that the petition be dismissed. (App. 25.) The District Court Judge, however, without conducting any additional evidentiary hearing, rejected the Magistrate's recommendation and granted the writ. The District Court concluded that the respondent had been denied the effective assistance of counsel because counsel had not (1) requested that the preliminary hearing be transcribed, (2) asked additional *voir dire* questions of prospective jurors, (3) called character witnesses to testify on behalf of the defendant, and (4) requested more detailed jury instructions. (App. 43, 50, 53.)

On appeal to the United States Court of Appeals for the Fourth Circuit, the court did not discuss counsel's failure to request a transcript of the preliminary hearing but held that the respondent had been denied effective assistance by counsel's failure (1) to ask additional *voir dire* questions, (2) to call character witnesses on behalf of the respondent, and (3) to ask for more detailed jury instructions. (App. 61.) The Court of Appeals also held that respondent's

counsel should have called additional witnesses in an attempt to attack the prosecutrix's testimony. (App. 61-62.)

IV.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

A.

Proper Application of the Standard for Effective Assistance of Counsel to Tactical Decisions Adopted by Defense Counsel Is an Important Issue of Federal Law Which Has Not Been Settled by this Court.

Of all the issues raised in post-conviction habeas corpus proceedings, allegations of ineffective assistance of counsel are the most frequent and predominant. Such allegations consume a striking amount of the time and resources of both the state and federal judiciary. *See, e.g., United States* v. *DeCoster,* 624 F.2d 196 (D.C. Cir.) (*en banc*), *cert. denied,* 444 U.S. 944 (1979); *Washington* v. *Strickland,* 693 F.2d 1243 (5th Cir. 1982), *cert. granted,* 51 U.S.L.W. 3865 (1983); *Stokes* v. *Warden,* ... Va. ..., 306 S.E.2d 882, 884 (Sept. 9, 1983).

In 1970, this Court in *McMann* v. *Richardson,* 397 U.S. 759, 771 (1970), considered whether a habeas corpus petitioner could attack his guilty plea as being unintelligently made because of erroneous advice by counsel relating to the admissibility of the petitioner's confession. This Court held that a defendant's plea based on reasonably competent advice was intelligent and thus not subject to attack. This Court added that whether a plea prompted by a confession erroneously deemed admissible was unintelligent depended not on whether a court might retrospectively consider the advice of his counsel to be right or wrong, but rather on whether "that advice was within the range of competence demanded of attorneys in criminal cases." *Id.* at 771.

Unfortunately, since *McMann,* this Court has not signifi-

cantly expounded upon the standard set forth therein for determining ineffectiveness of trial counsel. Indeed, the *McMann* standard has generated a "semantic merry-go-round." *United States* v. *DeCoster*, 624 F.2d at 206. The problem is most acute in those cases wherein the *McMann* standard is applied to tactical decisions of counsel. Defense attorneys are continually subjected to second-guessing by a habeas court, with little deference to counsel's deliberate strategic choices. In fact, this is exactly what occurred in the instant case. Defense counsel, after deliberation, chose not to request permission to pose *voir dire* questions to the panel of prospective jurors beyond those already asked by the trial court. Likewise, he made a conscious decision not to call witnesses who, the court below suggests, might have weakened the testimony of the prosecutrix, and he deliberately decided for strategic reasons not to call admittedly available character witnesses. After considering the instructions which had been proposed, he made a tactical decision not to request that those instructions be modified in order that they be more specific. Nevertheless, these three decisions were held by the Court of Appeals to constitute ineffective assistance of counsel.

Petitioners recognize that this Court has recently granted a writ of certiorari in *Washington* v. *Strickland*, 51 U.S.L.W. 3865 (1983), a case involving the effectiveness of defense counsel's tactics at the sentencing phase of a capital murder trial. Accordingly, it is respectfully submitted that a writ of certiorari should be granted in the case at bar, and that at a minimum this case should be held in abeyance pending the decision in *Strickland*. This Court should enunciate and then apply its standard to everyday trial occurrences and tactics in a case such as the instant one, thus offering concrete examples of the standard in practical use.

B.

The Respondent Was Not Denied Effective Assistance of Counsel.

The general right to counsel provided for in the Sixth Amendment of the United States Constitution has evolved to mean the right to the effective assistance of counsel. *McMann* v. *Richardson*, 397 U.S. 759 (1970). In *Marzullo* v. *Maryland*, 561 F.2d 540 (4th Cir. 1977), the Fourth Circuit, utilizing *McMann*, adopted a new standard for determining the effectiveness of counsel: Was defense counsel's representation within the range of competence demanded of attorneys in criminal cases? 561 F.2d at 543. In adopting this standard, the Fourth Circuit cautioned that effective representation was not the same as errorless representation. *Id.* at 544. It further opined that in order to merit relief, "a convict generally must establish that his counsel's error was so flagrant that a court can conclude it resulted from neglect or ignorance rather than from informed, professional deliberation." *Id.* Purporting to apply the standard, the court concluded that the respondent had been denied effective assistance of counsel. The conclusion represents a misapplication of the court's own standard.

The record reveals that defense counsel was an experienced trial lawyer. He had been practicing law since 1969 and had tried approximately 200 criminal cases before juries. Following respondent's arraignment at his criminal trial, the trial court informed a panel of prospective jurors of the charges against him and conducted a *voir dire* examination in conformity with the requirements of Rule 3A:20, *Rules of the Supreme Court of Virginia*.[3] Defense counsel

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[3] Rule 3A:20 requires that the trial court ask whether anyone:
(1) Is related by blood or marriage to the accused or to a person against whom the alleged offense was committed;
(2) Is an officer, director, agent or employee of the accused;

asked no additional questions. At the habeas hearing defense counsel testified that he thought the judge's questions directed to the jurors were adequate. (H.C. Tr. 336.) There was no testimony at the habeas hearing or even a suggestion that any of the jurors were biased, prejudiced or unable to objectively evaluate the evidence. The Court of Appeals, however, suggested that counsel might have asked more specific questions in an attempt to discover any possible bias. It appears that the court merely substituted its opinion as to what questions might have been asked by counsel and speculated as to how such questions might have been useful, without focusing on the issue of whether the failure was so flagrant that it was based on neglect or ignorance rather than informed professional deliberation.

In finding further that respondent was denied the effective assistance of counsel because of counsel's failure to call witnesses in his behalf who could have weakened the testimony of the victim, the Court of Appeals apparently discounted the testimony of defense counsel explaining the reasons underlying his tactics. At trial the prosecutrix testified that she had been subjected to numerous assaults by the respondent. In an effort to bolster her testimony, the prosecution presented evidence that she had moved into her sister's room which had a lock on the door and that on one occasion the prosecutrix had assaulted the respondent.

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(3) Has any interest in the trial or the outcome of the case;

(4) Has acquired any information about the alleged offense or the accused from the news media or other sources and, if so, whether such information would affect his impartiality in the case;

(5) Has expressed or formed any opinion as to the guilt or innocence of the accused;

(6) Has a bias or prejudice against the Commonwealth or the accused; or

(7) Has any reason to believe he might not give a fair and impartial trial to the Commonwealth and the accused based solely on the law and the evidence.

Because of the number of assaults alleged, coupled with the failure of the prosecutrix to complain until long after the alleged commission of these offenses, her veracity was clearly at issue. The court concluded that the reasonable inferences to be drawn by the jury from this evidence were that the prosecutrix moved to her sister's room out of fear of the respondent and that she attacked him because of the assaults against her. Accordingly, the court reasoned that to refute these inferences, counsel should have introduced evidence to show that there were other reasons for the prosecutrix's actions.

Defense counsel testified that he had talked with the brother of the prosecutrix and learned that while he would testify as to a similar attack made upon him by the prosecutrix prior to the attack on the respondent, he would also testify that he had seen a change in her attitude toward the respondent during the period when the offenses occurred. Counsel's opinion was that this testimony would "hurt more than help." (H.C. Tr. 316.) Counsel also stated that in his judgment the evidence had not clearly indicated any reason for her move and that other evidence showed that the prosecutrix was not afraid of the respondent. His decision not to call the brother of the prosecutrix was clearly reasonable and the result of informed professional deliberation.

With respect to counsel's failure to call character witnesses on behalf of the respondent, evidence at the habeas corpus hearing revealed that these witnesses could have testified at trial as to respondent's general good character and his reputation for truth and veracity. Counsel made a tactical decision not to call them because he felt that this was a case in which portraying the respondent as a "hard-working, nice, gentle, honest whatever character you can come up with or character trait," would not have had any

effect on the jury because of the "covert type of... these charges." He indicated that had he put on character witnesses, this would have detracted from his primary defense, namely, that Lankford had not committed the offense charged. (H.C. Tr. 322.)

Lastly, in explaining his failure to request the trial court to grant instructions defining the elements of the crime charged, defense counsel indicated that his theory of defense was denial that the offenses occurred, and that he did not want to do anything to weaken this defense or confuse the jury with other issues or defenses. He said "the all or nothing was that he did not do anything; that is why I thought they [the instructions] were adequate." (H.C. Tr. 347.) In his opinion, any qualification of his defense would have diluted its effectiveness. Again these decisions resulted from informed professional deliberation, not neglect or ignorance.

It is clear that the decisions made by counsel in this case were tactical decisions. When an attorney makes such decisions and they are based on the exercise of professional judgment after reasonable investigation into the matter, the courts will find counsel's assistance ineffective only if the choices were so patently unreasonable that no competent attorney would have made them. *Washington* v. *Strickland, supra,* at 1254; *United States* v. *DeCoster, supra,* at 208.

The Court of Appeals' application of the *Marzullo* standard in previous cases involving trial tactics has been consistent with this reasoning. For example, in *Sallie* v. *North Carolina,* 587 F.2d 636 (4th Cir. 1978), the court reiterated that "this standard does not require that representation be flawless, only that all decisions materially affecting defendant's representation be the product of informed judg-

ment, not neglect or ignorance." *Id.* at 640. It further stated that "*Marzullo* was not intended to promote judicial second-guessing on questions of strategy..." *Id.* In holding that defense counsel was not ineffective for his failure to have learned of the trial judge's participation in an earlier trial, in *Wyatt* v. *United States,* 591 F.2d 260 (4th Cir. 1979), the court recognized that counsel's representation was vigorous throughout the trial and there was no suggestion of perfunctoriness or lack of general preparation in respect to the facts and law relevant to the case. The court further noted that counsel was "actively involved in making a considered tactical decision on a critical matter rather than one neglectful or ignorant of the importance that a deliberate choice be made. That the decision may in the event have involved tactical error...is of no moment to our inquiry." *Id.* at 267. Even in *Marzullo* where the court found that counsel was ineffective, it pointed out that counsel had made no claim that his decision not to challenge the jury was a trial tactic. 561 F.2d at 547.

Although the Court of Appeals has repeatedly stated that effective assistance does not mean errorless representation, *Marzullo* at 544, it appears to be holding counsel in this case to such a standard. Assuming *arguendo* that some of counsel's decisions constitute tactical errors under the circumstances, that fact is not important to the application of the standard where counsel's decisions, as in this case, were the result of informed professional deliberation rather than ignorance or neglect. Rather than follow its previous application of the standard, the Court of Appeals engaged in second-guessing the reasonable professional judgments of defense counsel. This is a prime example of the inconsistencies that exist with respect to application of the standard to trial tactics even within the same circuit.

Defense attorneys at the bar should know with some degree of certainty what is expected of them. This case presents the appropriate vehicle to provide needed guidance to state and federal courts grappling with the application of the standard of the effective assistance of counsel in the area of trial tactics.

CONCLUSION

Application of the standard to determine effective assistance of counsel should be applied by this Court to the facts and circumstances surrounding counsel's representation of the respondent in this case. Petitioners urge that this Court grant a writ of certiorari, reverse the judgment of the court below, and find that the respondent was not denied the effective assistance of counsel, or alternatively that this case be held in abeyance pending this Court's decision in *Strickland*.

Respectfully submitted,

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APPENDIX

APPENDIX A

In The

United States District Court

FOR THE WESTERN DISTRICT OF VIRGINIA
AT ROANOKE

Civil Action No. 81-0159-R

CHARLES LANKFORD,

Petitioner,

v.

O. S. FOSTER, *et al.*,

Respondents.

By: GLEN E. CONRAD, *United States Magistrate*

REPORT AND RECOMMENDED DISPOSITION
FILED DECEMBER 17, 1981

Charles Lankford filed this petition seeking habeas corpus relief under 28 U.S.C. § 2254. Lankford attacks the validity of three judgments of conviction entered against him on December 19, 1978, in the Circuit Court for the County of Fairfax, on three charges of forcible sodomy. Petitioner was sentenced to ten years on each count with the terms to run consecutively, and with one term suspended. By order entered September 15, 1981, Chief United States District Judge James C. Turk referred this case to the undersigned United States Magistrate for development and consideration. An evidentiary hearing was conducted

on November 12, 1981. As per the directive of the order of reference, the undersigned now submits the following report and recommendation.

STATEMENT OF PETITIONER'S ALLEGATIONS AND THE RELEVANT FACTUAL BACKGROUND

Petitioner claims that the three convictions are constitutionally defective due to ineffective assistance of counsel, and improper or inadequate instructions to the jury. He also challenges the sufficiency of the evidence. Lankford attributes the ineffective assistance to a number of elements as delineated in detail *infra*. The Commonwealth concedes that petitioner has exhausted his available state remedies as to all the various allegations of the petition. In order to state these allegations in the proper factual context, the undersigned deems it appropriate to briefly summarize petitioner's personal history as well as certain incidents of the state criminal proceedings.

Charles B. Lankford was born on January 28, 1924, and was raised in a family of meager financial resources. During and after a stint in the military, Lankford became involved in a series of activities which resulted in a number of criminal felony convictions, though none of these was sex related. Much of petitioner's early and middle life was spent in incarceration. While his record does manifest parole violation, it would seem that Lankford involved himself in many commendable endeavors while incarcerated. He finally exhausted this early series of criminal sentences in March of 1968. Thereafter, he participated in a number of community rehabilitation activities, first as a juvenile delinquent counselor and ultimately as Director of a local branch of Offenders Aid and Restoration. He was eventually accorded a full executive pardon as well as a number of awards and

recognitions for his community service. In 1975, Lankford unsuccessfully campaigned for the Office of Sheriff of Fairfax County.

On November 8, 1968, Lankford married Mrs. Mary Diaz. It was the second marriage for both. Mrs. Diaz had three children by her first marriage: Cynthia Diaz, Ralph Diaz, Jr., and Mary Ellen Diaz. About one year after their marriage, the Lankfords had a child of their own, Tracy. The family lived at a number of different locations in Northern Virginia. Eventually, Ralph Diaz, Jr. left the home to join his natural father who was residing in Florida. Later, Cynthia left the home to attend college and to begin married life. In about 1975, the Lankfords' marriage began to fail. In March of 1978, the couple entered into a voluntary separation agreement which provided, *inter alia,* for joint custody of Tracy with primary custody to be vested with Charles Lankford. It is relatively undisputed that Mrs. Lankford pressed for the separation and that petitioner hoped to save the marriage. Indeed, it would seem that Lankford remained possessive of his wife in the weeks following her departure from the home. On April 7, 1978, Mr. Lankford filed for divorce and sought sole custody of Tracy.

Mary Ellen Diaz, nicknamed Mia, was the prosecutrix in the state criminal action. Mia was about eight years old when her mother and Charles Lankford were married. She lived in the Lankford home until August of 1977 when she left to join her natural father and attend college in Florida. Sometime in April of 1978, Mia related to her father that she had been sodomized on numerous occasions by the petitioner while living in the Lankford home, during a period between about 1970 and 1976. These allegations led to the indictment of Lankford on three counts of sodomy. The indictments charged sodomy by petitioner with the

mouth on or about December 20, 1975, sodomy by the mouth on or about October 2, 1976, and sodomy with the mouth on or about November 12, 1976, all in violation of Va. Code § 18.2-361 (1950).

Sometime prior to the preliminary hearing in the case, petitioner retained William T. Shannon, Esq. as defense counsel. Shannon was already representing Lankford in the domestic relations case and had been a friend of Lankford's for several years. It is undisputed that the preliminary hearing was not recorded. The preliminary hearing apparently confirmed that the prosecutrix would be unable to specify the exact date on which the acts alleged in October and November of 1976 purportedly took place. Shannon's motion to dismiss those two counts on due process grounds was unsuccessful. The trial of the case took place on December 18-19, 1978. The case was tried to a jury. It is undisputed that *voir dire* was conducted solely by the trial judge without any input by counsel for the defendant or counsel for the Commonwealth. A review of the trial transcript reveals that the theory of defense was two pronged. Much of defendant's case was directed to the establishment of three appropriate alibis. The defense also attacked Mary Ellen's credibility. This latter attack was accomplished through questions phrased so as to suggest that her story was concocted to assist her mother in obtaining custody of the younger daughter, Tracy. In this context, the timing of Mia's revelations was emphasized. The defense also attempted to stress the implausibility of Mia's testimony that her stepfather had used her sexually on over a hundred occasions without the knowledge of any other member of the family and without any complaint from the victim until almost eighteen months after the last incident was alleged to have occurred.

At trial, Mia and Mrs. Lankford testified as Commonwealth's witnesses. The prosecutrix testified that she was about nine years of age when she was first abused by petitioner. She related that thereafter, over a hundred such incidents occurred. Mia stated that she did not realize the significance of the encounters for several years. She testified that she told no one about the incidents because her stepfather warned her that it would hurt her mother to find out. Mia related that she developed a gradually increasing hatred for Lankford as her sexual awareness developed. She noted that she threatened him with a knife on one occasion during a quarrel between Lankford and her mother. She maintained that upon moving to Florida, she was reluctant to tell her natural father, Ralph Diaz, Sr., about the incidents and did so at the insistence of her stepmother, Diaz's new wife, with whom she had counseled. The prosecutrix testified that she did not want to tell her mother about the incidents or press formal charges, but that Diaz informed Mrs. Lankford and insisted that she inform the authorities.

It is undisputed that when Mrs. Lankford was called as a witness for the Commonwealth, defense counsel neither moved for a mistrial nor sought to invoke the spousal privilege prohibiting such testimony as permitted under Va. Code § 19.2-271.2 (1950). Through Mrs. Lankford, much testimony relative to the couple's marital discord was introduced. Mrs. Lankford also testified that when her daughter Cynthia left the home, Mia moved into Cynthia's old bedroom and that that bedroom had a lock on the door while Mia's old bedroom did not.

The defense presented its case on the second day of the trial. It is undisputed that Shannon did not meet with Lankford on the intervening night. The first defense witness, Clint Holley, was a close friend of both Mr. and Mrs. Lank-

ford. Holley related that after Mia's charges had been made, Mrs. Lankford suggested to him that she might be inclined to "let the whole thing drop" if she could "get Tracy away from Charles." The next three persons called by the defense were alibi witnesses. Charles Lankford then testified in his own behalf. Generally, petitioner testified that he had had no sexual relations with Mia and that his relationship with his stepdaughter had been good. Mr. Lankford testified concerning his community activities and his executive pardon. He related that he had had occasion to discipline Mia as she grew older, perhaps more so than with the other children. On cross-examination and with no objection by the defense, Lankford testified in contradiction of Mia's earlier testimony that after she moved to Florida, he called her on several occasions offering to set her up in business and make her beneficiary on his life insurance policy. Lankford confirmed his wife's early testimony that the couple ceased having sexual relations after Tracy's birth. He disputed Mrs. Lankford's testimony concerning the violence of his behavior at her apartment on an occasion shortly after the couple had separated, and shortly before Mrs. Lankford filed for divorce. Lankford testified as to his belief that Mia made the charges so as to assist her mother in gaining custody of Tracy.

The defense rested after Lankford's testimony. The Commonwealth then called three rebuttal witnesses. Ralph Diaz, Jr. testified that from his observation, Lankford always treated Mia more leniently than Cynthia or himself. A police officer testified as to the date of a warrant served on Lankford as a result of the argument between Lankford and his wife in the latter's apartment shortly after the separation. Ralph Diaz, Sr. testified that after Mia came to live with him, he became concerned with the number of phone

calls she was receiving from petitioner. He related that because of this concern, he undertook to listen to several of those phone conversations on another line. Diaz, Sr. confirmed that he heard Lankford offer to set Mia up in business and make her his life insurance beneficiary. Diaz, Sr. went on to confirm Mia's testimony as to how the allegations against Lankford came to be made.

In light of the elements of this case as stated above, petitioner's allegations of ineffective assistance of counsel may now be summarized as follows:

a. Petitioner claims that defense counsel erred in not causing the testimony at the preliminary hearing to be recorded so as to provide a basis for subsequent impeachment.

b. Petitioner claims that counsel erred in not attempting to exclude the prosecutrix's testimony as to prior uncharged sexual acts.

c. Petitioner claims that counsel failed to investigate and secure otherwise available sources of testimony to the effect that petitioner's relationship with the prosecutrix was normal and evinced no such hatred as she described. Petitioner further reasons that such testimony would have tended to buttress the child custody motivation for fabrication. In this context, petitioner also notes that certain witnesses could have testified that the animosity manifested towards him by the prosecutrix could have been related to his exercise of discipline, and that counsel should have secured the services of a psychiatrist to testify that such discipline may have caused a psychological motive for the prosecutrix to lie.

d. Petitioner claims that counsel erred in not attempting to discover on *voir dire* whether any of the prospective jurors had any strong feelings about sexual crimes.

e. Petitioner claims that counsel erred in not excluding Mrs. Lankford as a witness or moving for a mistrial when she was called. As to this latter element, petitioner asserts that a mistrial might have discouraged the prosecutrix from undergoing the ordeal of testifying a second time, and, that if it did not, her original testimony could have been used for subsequent trial preparation.

f. Petitioner claims that counsel erred in not attempting to rebut the effect of the testimony regarding the knife incident. Petitioner asserts that a few days before that incident, the prosecutrix had threatened Ralph Diaz, Jr. with a knife and that he had so informed counsel.

g. Petitioner claims that counsel erred in not attempting to rebut the effect of Mrs. Lankford's testimony regarding the prosecutrix's move to a bedroom with a door lock. Petitioner asserts that a witness was available who would have testified that Mrs. Lankford told her that the prosecutrix moved due to a morbid fear of outside intruders.

h. Petitioner claims that counsel erred in not producing evidence to rebut any inference of need for sexual fulfillment by petitioner upon the earlier termination of sex with Mrs. Lankford. Petitioner asserts that there was evidence available as to his sexual relations with other women during the latter years of his marriage.

i. Petitioner claims that counsel erred in failing to object to the prosecution exceeding the scope of direct examination of the defendant, thus opening the door for the testimony of Diaz, Sr., to the effect that he heard Lankford's offers attempting to "buy" the silence of the prosecutrix.

j. Petitioner claims that counsel erred in his failure to investigate and call possible character witnesses.

k. Petitioner claims that counsel erred in his failure to prepare defense witnesses.

l. Petitioner claims that counsel failed to request an appropriate instruction defining the elements of force and penetration.

m. Petitioner claims that counsel failed to request a limiting instruction as to the uncharged acts.

In addition, petitioner claims, as an alternate ground, that the trial judge failed to properly instruct the jury as to several key elements, including the need for force; the need for penetration; prior uncharged acts; and reasonable doubt. Finally, petitioner claims that there was insufficient evidence of force and penetration so as to sustain the convictions.

SUMMARY OF EVIDENCE ADDUCED AT HEARING

A number of witnesses testified at the evidentiary hearing. Several witnesses for the petitioner related that they could have testified at the state trial as to Lankford's good character and/or the apparent normalcy of the relationship between Lankford and the prosecutrix. These witnesses noted that they were not called upon to testify by Mr. Shannon, and several of the witnesses related that they were not even interviewed by Mr. Shannon. Several of these witnesses noted specific examples. Lulu Holley, the wife of Clinton Holley, who did testify at the trial, related that she understood that Mia wanted to return from Florida to the Lankford home before the separation. Clinton Holley testified that he overheard Lankford tell Shannon that Mia's school field hockey coach might be able to assist in establishing an alibi for one of the incidents. Ralph Diaz, Jr. related that his sister Mia had a short temper and was gen-

erally moody. Of these "uncalled" witnesses, Diaz, Jr., Clinton Holley, and a Warren Yates related that they had been contacted by attorney Shannon. Holley and Yates did testify at the state trial, though not as character or "family relationship" witnesses, while Diaz, Jr. appeared as a prosecution witness. In addition to the "uncalled" witnesses who testified at the evidentiary hearing, the parties have stipulated that five other potential character witnesses were available and were not called because Shannon did not feel such testimony was necessary.

Given certain proffers and a stipulation reached by the parties, it seems that there is conflicting medical opinion as to whether a clinical examination of the prosecutrix by a psychiatrist could have resulted in any firm conclusion as to whether the prosecutrix was psychologically motivated to fabrication of the charges.

Charles Lankford testified at the hearing. Lankford noted that he could have raised money to pay for transcription of the preliminary hearing had his attorney so advised. Petitioner testified that he and Shannon met on a few occasions prior to trial and that they had not discussed whether Mrs. Lankford should have been allowed to testify. Lankford, who was out on bond prior to trial, related that Shannon had left much of the investigation of alibi witnesses to him. He noted that he told Shannon about Mia's knife threat against Ralph Diaz, Jr. Lankford stated that he gave Shannon a list of potential character witnesses.

Two members of the Roanoke City Bar, G. Marshall Mundy, Esq. and Robert Rider, Esq., appeared at the hearing and were qualified as experts in matters of criminal defense. Both opined that the legal services rendered by Shannon in petitioner's case fell below the normal range of competence demanded of attorneys in Virginia criminal

trial practice. Both identified the failure to have the preliminary hearing recorded and the failure to press for more detailed *voir dire* as negligent omissions. Both stated that they would have excluded Mrs. Lankford and would have moved for a mistrial when she was called. Both stated that they would have directed a more vigorous attack on Mia's credibility, and would have more clearly developed evidence and argument as to alternate motivations for fabrication. Both related that they would have interviewed and prepared defendant during the evening between the two trial days. Both testified that they would have called character witnesses. Based on these and a number of other elements developed in their testimony, Mundy and Rider concluded that the errors and omissions of defense counsel manifested ignorance and/or neglect, rather than reliance on a viable trial strategy or tactic.

William T. Shannon, Esq. testified as a witness for the respondent. Shannon related that he has tried approximately two hundred criminal cases. Shannon noted that prior to the preliminary hearing, the prosecutrix had already passed a lie detector test. Shannon related that he discussed the criminal proceedings and potential witnesses with Lankford, by phone and in person, on many occasions both before and after the preliminary hearing. According to Shannon, he did not feel that recording the preliminary hearing was necessary inasmuch as he had already learned through the prosecutor that Mia's testimony would be very inexact. He noted that as it turned out, there was no significant variance between the testimony at the hearing and at trial. Shannon related that in his discussions with Lankford, the client always emphasized the child custody matter as the real motive behind the charges, and frequently suggested a conspiracy between Mrs. Lankford and Mia. For that reason, and given

the strong and even excessively emotional statements evinced by Mrs. Lankford at the preliminary hearing, Shannon testified that he felt that it would be better to let Mrs. Lankford testify. He also considered it appropriate to let her tell the jury that she had absolutely no prior knowledge of what were alleged to be over a hundred sexual attacks. Indeed, Shannon noted that he would have probably called Mrs. Lankford as a defense witness, and therefore considered a motion for mistrial to have been ethically inappropriate.

Shannon testified that he was aware of the knife incident with Ralph Diaz, Jr. However, he related that after talking to Diaz, Jr., he was reluctant to delve into the subject of family relationships with that witness inasmuch as Ralph, Jr. would confirm that Mia manifested increasing dislike for Lankford as she grew older. Shannon testified that he did not choose to emphasize the harsh disciplinarian motivation for Mia's fabrication, inasmuch as he thought that her length of time away from the home would have rendered such a theory implausible. Shannon stated that Lankford identified numerous witnesses who could testify as to his good relationship with Tracy, and his good character. However, Shannon stated that he considered such witnesses would not be necessary given the fact that the relationship with Tracy and the community deeds could be covered through the testimony of Lankford, and for that matter, Mrs. Lankford. Shannon noted that he decided against calling character witnesses because of the "covert nature" of the charges. Shannon testified that Lankford was aware prior to trial that character witnesses and "rehabilitative" witnesses would not be called, and that the decision not to use these people was made jointly. Shannon stated that he perceived no reason or justification for moving for a court

ordered psychiatric examination of the prosecutrix. Shannon stated that he did not attempt to exclude Mia's testimony of over a hundred uncharged acts because he felt that such an excessive number of alleged incidents, totally unbeknownst to any other member of the family, would serve to undercut her credibility. He stated that this matter was also thoroughly discussed with Lankford.

Shannon testified that he did not adduce any evidence of petitioner's adultery because he thought this would be inflammatory in a sex case. Shannon related that he felt that the court's *voir dire* was comprehensive and satisfactory. Shannon noted that he did not feel that evidence of Mia's knife threat against Ralph Diaz, Jr. would have discredited the testimony concerning her growing hatred of petitioner. Shannon testified that he simply missed the prosecution's inference concerning Mia's move to a room with a door lock.

Generally, Shannon's testimony suggests that his primary trial tactic was to keep the case simple so as to present the jury with the clear cut issue of weighing the credibility of Lankford versus that of the prosecutrix. Shannon considered this to be the ultimate issue and he felt that the circumstantial evidence weighed in defendant's favor. Shannon testified that in the weeks prior to trial, he devoted almost all of his time to the defense of a man he considered to be his friend. In retrospect, Shannon opined that if he made errors in the case, the greatest was allowing himself to accept a case in which he had personal involvement with many of the principals.[1]

John N. Lampros, Esq., of the Roanoke Bar, appeared at the hearing and was qualified as an expert in Virginia criminal trial practice. Lampros opined that a preliminary hear-

[1] Shannon noted that he had known Mr. and Mrs. Lankford and Mr. and Mrs. Holley for several years. Indeed, he met Lankford through Clint Holley.

ing recording was not necessary, and that such recordings are quite unusual in actual practice. Lampros testified that allowing in evidence of the uncharged prior acts was a legitimate trial tactic in attempting to discredit the prosecutrix. He considered the calling of character witnesses to be a matter within defense counsel's discretion. Lampros stated that he knew of no legal authority for an involuntary psychiatric examination of a complaining witness. Lampros related that he would not have attempted to exclude Mrs. Lankford, especially since she could not provide direct corroboration of any of the alleged acts. He stated that he would not have moved for a mistrial. Lampros testified that he did not feel that it was necessary for counsel to have adduced evidence of alternate sexual outlets, nor was it necessary for counsel to have objected to the prosecution exceeding the scope of direct examination of Lankford regarding the phone calls to Florida. He considered these matters to be tactical decisions. Given the theory of the defense, Lampros saw no reason for a detailed instruction on force and penetration. While Lampros might have attempted to rebut the evidence of the knife incident and the change of bedrooms, he did not consider such rebuttal to have been crucial to the defense. Lampros opined that extensive *voir dire* can antagonize prospective jurors. In general, Lampros testified that, after reviewing the trial transcripts, he was of the opinion that the competence of the legal services provided to Lankford fell within the range of competence normally demanded of Virginia trial lawyers in similar circumstances.

GENERAL STATEMENT OF THE APPLICABLE LEGAL STANDARDS

Under the Sixth and Fourteenth Amendments, a criminal defendant, subject to incarceration, must be afforded the right to assistance of legal counsel. The right to legal counsel implies a right to effective assistance of counsel. *Marzullo* v. *Maryland,* 561 F.2d 540 (4th Cir. 1977), *cert. den.* 435 U.S. 1011 (1978). In *Marzullo,* the United States Court of Appeals for the Fourth Circuit took explicit departure from the "farce and mockery" test which had long governed the determination of adequacy of defense counsel in this circuit. *See e.g., Root* v. *Cunningham,* 344 F.2d 1 (4th Cir. 1965). While the departure had been foreshadowed [*see Coles* v. *Peyton,* 389 F.2d 224 (4th Cir. 1968)], the Fourth Circuit took the occasion in *Marzullo* to state the applicable rule in terms of the normal range of competency evaluation which had been enunciated by the United States Supreme Court in *McMann* v. *Richardson,* 397 U.S. 759 (1970). Employing what is undoubtedly a more rigorous standard, this court is now required to compare the legal services rendered in the instant case to the range of competence normally demanded of attorneys in criminal cases. As to the standard under which competency of counsel is to be measured, the Court in *Marzullo* noted that the matter is generally one left to the discretion of the district judge. The Court went on to state as follows:

> In exercising its discretion, a trial court may refer to other sources to determine the normal competency of the bar. Among these are precedent from state and federal courts, state bar canons, the American Bar Association Standards Relating to the Defense Function . . . and in some instances, expert testimony on the particular conduct at issue.

561 F.2d at 544.

Generally, the sufficiency of a state trial judge's jury instructions cannot be collaterally attacked by way of federal habeas corpus unless an objection was raised at the time the instructions were propounded, in accordance with the applicable state procedure. *Wainwright* v. *Sykes*, 433 U.S. 72 (1977). Of course, the failure of counsel to make appropriate objection to improper or inadequate jury instructions is an element to be considered in evaluating the ineffectiveness of the legal assistance. *See, e.g., Taylor* v. *Starnes*, 650 F.2d 38 (4th Cir. 1981). As to the sufficiency of the evidence relating to force and penetration, it must be determined whether, after viewing evidence in a light most favorable to the prosecution, any rational trier of fact could find such essential elements to exist beyond a reasonable doubt. *Jackson* v. *Virginia*, 443 U.S. 307 (1979).

FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS

As supplemented by the foregoing summaries and statements of fact, the undersigned now submits the following findings, conclusions, and recommendation:

1. The instant petition for writ of habeas corpus is before the court for resolution on the merits, jurisdiction being vested under 28 U.S.C. § 2254. In paragraph #3 of their Answer, respondents concede full exhaustion of state remedies.

2. The undersigned finds petitioner's claim regarding the sufficiency of the evidence of force and penetration to be without merit. A review of the trial transcript reveals that there was clear evidence of both force and penetration, on the occasions of each of the three alleged incidents, from which a rational trier of fact could find beyond a reasonable doubt that these elements of the charged offenses occurred.[3]

[3] Trial Transcript of December 18, 1978, at 39 (12/20/75), 45 (10/2/76), and 50 (11/12/76).

Such evidence was developed through the testimony of the prosecutrix. In Virginia, the uncorroborated testimony of the prosecutrix can sustain a conviction on such charges. *See gen., Young* v. *Commonwealth,* 185 Va. 1032, 40 S.E.2d 805 (1974); 15 *Michie's Jurisprudence,* Rape § 21. Accordingly, the undersigned concludes that there was sufficient evidence to support each of the convictions. *See Jackson* v. *Virginia, supra.*

3. Petitioner claims that the trial court's jury instructions were so inadequate or incomplete as to violate his right to due process. Specifically, petitioner complains of the absence of instructions as to force and penetration, the absence of a limiting instruction as to the uncharged acts, and the inadequacy of the reasonable doubt charge. However, inasmuch as it is undisputed that no contemporaneous objection was made as to any of these points, it must be concluded that the legal sufficiency of the charge cannot now provide grounds for federal *habeas* relief. *Wainwright* v. *Sykes, supra.* Moreover, the undersigned is unable to discern any deficiency in the charge which reaches constitutional dimension. The trial judge informed the jury as to the statutory elements necessary for conviction. (Trial Transcript of December 19, 1978, at 176-177). While force and penetration were not specifically defined, the evidence at trial did not necessitate that the jury make any fine distinctions in these matters. Clearly, the trial judge is not required to make detailed instructions in all areas of possible conflict which are not reasonably raised through the evidence. *Spruill* v. *Commonwealth,* 221 Va. 475, 271 S.E.2d 419 (1980). Indeed, jury instructions should normally conform to the evidence of the case. *See, gen.,* 10A *Michie's Jurisprudence,* Instructions § 24. The undersigned finds that the trial judge did inform the jury as to reasonable

doubt (Tr. of December 19, 1978, at 174) and that the instruction was further buttressed by charges as to presumption of innocence (Tr. at 173-174) and inconsistent reasonable hypotheses (Tr. at 174). As to a limiting charge on uncharged prior acts, it was abundantly clear to all the trial participants that the defense was grounded on the assertion that none of the acts, charged or uncharged, took place. Indeed, the number of such uncharged acts was perhaps the most significant factor weighing against the plausibleness of the prosecutrix's testimony. In such circumstances, the omission of a limiting instruction was not prejudicial and was certainly not violative of constitutional due process. The undersigned concludes that petitioner is not entitled to relief due to any deficiency in the jury instructions.

4. The true crux of the petition concerns the effectiveness of the efforts of defense counsel. Of course, legal representation can never be said to be totally effective when the desired result is not obtained. However, after a review of the state transcript in this case and after consideration of all the evidence of record, the undersigned must find that defense counsel's efforts fell within the normal range of competence demanded of attorneys in like situations.

5. Simply stated, many of the ineffectiveness allegations raised by petitioner relate to matters of trial tactics, or, more specifically, tactical emphasis. It cannot be seriously argued that counsel erred in basing the defense on the dual elements of alibi and discreditation of the prosecutrix. As to this latter element, Shannon chose to emphasize the child custody fight as the motive for fabrication. Petitioner's position, as skillfully underlined by his expert witnesses, is that the attack on the prosecutrix's credibility should have been more broad. In addition to the child custody motivation, petitioner urges that Shannon should have emphasized the

reaction to the discipline motivation for fabrication. Petitioner asserts that evidence of his own reputation for truth and veracity should have been adduced through character witnesses, and that the improvement or "rehabilitation" in his personal life should have been brought to the jury's attention. Finally, Lankford believes that Shannon should have called witnesses to testify as to the normalcy of the father-stepdaughter relationship. While it is at least arguable that these additional elements may have proved of benefit, the undersigned finds that Shannon's approach to the case was fashioned as a result of professional deliberation, and that it did not result from either ignorance or negligence. Moreover, the undersigned finds that tactical approach was not so unreasonable in light of the need for such testimony, relative to character, rehabilitation, and alternate motivation, as to amount to ineffective assistance. *See Goodson* v. *United States,* 564 F.2d 1071 (4th Cir. 1977). While the failure to call these witnesses may have constituted an error in judgment, any such error was obviously not flagrant and cannot stand as a ground for relief. *See Tompa* v. *Commonwealth,* 331 F.2d 552 (4th Cir. 1964).

As to the alternate motivation of discipline reaction, Shannon simply determined that the possibility was too remote in time and circumstance as to justify a diversion of the jury's attention. While Shannon recognized that a defendant's position is sometimes enhanced by the testimony and community status of character witnesses, counsel felt that the covert nature of the alleged acts destroyed the potential advantage to be secured by use of such persons. Although witnesses may have been available to testify as to the normalcy of the father-stepdaughter relationship, it is readily apparent that such evidence could have cut two ways. Indeed, petitioner's position in this regard is some-

what inconsistent. Petitioner urges that some of these same witnesses would have testified that the prosecutrix manifested increasing reaction as she grew older due to what they would have pictured as Lankford's exercise of discipline. Yet, the prosecution could have easily argued that such reaction was consistent with Mia's testimony that her increased dislike for Lankford paralleled the development of her understanding of the meaning of the alleged sexual interactions.

It is not dispositive that the undersigned might find that the failure to call additional witnesses was not a good decision, that the attack on the prosecutrix's credibility was too limited in scope, or that other attorneys might have adopted different tactical strategy. The crucial finding is that Shannon's trial strategy was a result of professional deliberation and not ignorance or negligence, and that such strategy was not patently unreasonable. Given this finding, the undersigned concludes that the failure to call additional witnesses did not evince ineffective representation of counsel as delineated by *Marzullo* v. *Maryland, supra.* Absent flagrant abuse, the adequacy of tactical decisions is simply not a relevant inquiry in determining effectiveness of counsel. *United States* v. *Robinson,* 502 F.2d 874 (7th Cir. 1974); *United States* v. *Basch,* 584 F.2d 1113 (1st Cir. 1978).

6. For similar reasons, the undersigned finds many of petitioner's other allegations to be without merit. Shannon reasoned that the great number of uncharged acts, alleged to have occurred over a long period of time and totally unbeknownst to any other members of the family, would weigh against the credibility of the prosecutrix. This was clearly a reasonable professional appraisal. The undersigned concludes that the decision not to exclude evidence of the

uncharged acts did not manifest ineffective assistance of counsel.

Given Mrs. Lankford's lack of knowledge of any of the alleged acts and the expectation of her irrational and intensely emotional testimony regarding the defendant, Shannon determined to allow her to testify so as to buttress the notion of a mother-daughter conspiracy in the child custody matter. While not necessarily the better choice, this decision also finds some basis in reason. It matters not whether Shannon understood that she could have been excluded inasmuch as he had independently determined to call her as a defense witness thus waiving the privilege. It must be concluded that this decision was also an exercise of professional judgment as opposed to a manifestation of ignorance or neglect.

7. There is no evidence which suggests that Lankford's case was prejudiced due to the absence of a preliminary hearing recording or transcript. The undersigned concludes that the decision not to cause such a recording to be prepared in no way represents a denial of effective assistance of counsel.

8. The undersigned finds that defense counsel's failure to press for a psychiatric examination of the prosecutrix did not constitute a negligent omission. Given counsel's knowledge that the prosecutrix had passed a lie detector test (thus weighing against conscious fabrication) and what has been found to be his reasonable tactical choice to forego the discipline reaction motivation in favor of the child custody motivation, such failure is not overly significant. In any case, the undersigned is aware of no Virginia authority which would have permitted such an examination. The undersigned must conclude that the failure to move for a

psychiatric examination did not constitute ineffective assistance of counsel.

9. The sufficiency of the *voir dire* was clearly a matter of professional judgment. There is no evidence which suggests that defense counsel's judgment in the matter of jury selection was unreasonably poor or negligent, nor is there evidence that petitioner was prejudiced by the inclusion of any particular juror. Clearly, there was no right to counsel-conducted *voir dire*. *Turner* v. *Commonwealth*, 221 Va. 513, 273 S.E.2d 36 (1980). In any event, the testimony of the expert witnesses indicated that some attorneys wish to avoid extensive *voir dire* so as not to antagonize or inflame prospective jurors. Absent some indication of actual prejudice, the undersigned must conclude that supplemental questioning of prospective jurors is not necessarily required of Virginia counsel under normal practice, even in sex abuse cases.

10. The undersigned finds that defense counsel's failures to attempt to make specific rebuttal of the knife incident and the change of bedroom circumstance are not constitutionally cognizable. Shannon was aware that the knife incident could have been rebutted in part through Ralph Diaz, Jr. However, Shannon testified that he knew from talking with Ralph, Jr. prior to trial that Ralph's testimony could confirm Mia's testimony of growing dislike for Lankford as she grew older. It is not unreasonable that Shannon chose not to bring the knife incident up again in the context of such potential testimony. As it was, Shannon had used Lankford's testimony to focus on the knife incident as simply a matter of Mia taking her mother's side in a domestic quarrel between Lankford and his wife. (Tr. of December 19, 1978, at 57). It is not unreasonable that Shannon chose to leave the knife incident at that.

As to the bedroom move, Shannon admits that he simply missed the inference the prosecution was trying to make. There is no evidence suggesting that Shannon had reason to anticipate this testimony or the need for a rebuttal. Such surprises are incident to almost every trial. While it is possible that both the knife incident and bedroom change could have been handled better by the defense, the Constitution does not require errorless representation. *Marzullo* v. *Maryland, supra* at 544. The undersigned concludes that if errors were made in this regard, they were not flagrant.

11. The undersigned concludes that the decision not to adduce evidence of Lankford's alternate sexual outlets did not constitute ineffective assistance. Obviously, it was not unreasonable that Shannon wished to avoid any suggestion of his client's propensity for illicit sexual activity. Such evidence could easily have inflamed the jury. This was simply a matter of professional judgment.

12. Shannon testified that he had no prior knowledge that Ralph Diaz, Sr. would confirm Mia's testimony concerning the phone conversations with Lankford. Indeed, Lankford had steadfastly denied that the conversations took place. Thus, Shannon could not reasonably have foreseen that failure to object to the breadth of the prosecution's cross-examination of Lankford would be prejudicial to his client. Accordingly, it must be concluded that the failure to object did not constitute ineffective assistance of counsel. *Cooper* v. *Fitzharris*, 586 F.2d 1325, 1330 n.10 (1978).

13. The undersigned finds that counsel's investigation and preparation of the case were constitutionally sufficient. It is undisputed that Shannon contacted and interviewed many of the potential witnesses identified by his client. Since the potential alibi testimony and evidence were essentially objective in form, it is not particularly relevant that Shan-

non left some of this preparation to his client. As to the preparation of the client, the undersigned finds that Shannon interviewed Lankford on numerous occasions prior to trial. The undersigned finds that Shannon had discussed testimony and prepared the client for trial. While some attorneys might have used the overnight recess for additional client preparation, the undersigned is unable to find that Shannon's failure to do so rendered his representation ineffective. With the exception of the testimony regarding Mia's change of bedrooms, there apparently were no great surprises in the first day's testimony. Moreover, some attorneys routinely avoid over preparation of a client's testimony. Given the preparation and development which had already occurred, the undersigned must conclude that the mere failure to consult with witnesses in detail during the overnight recess was not so unreasonable or so prejudicial as to deprive Lankford of effective assistance of counsel.

14. The undersigned finds no basis in petitioner's assertion that counsel erred in his failure to press for a limiting instruction as to uncharged acts, and for more detailed force and penetration instructions. As noted above, force and penetration were not key issues in the case. The evidence at trial simply did not suggest a need for great elaboration as to the legal meaning of these terms. *See Spruill* v. *Commonwealth, supra.* It was not unreasonable or flagrant that Shannon did not propose such instructions. The limiting instruction was clearly not necessary given the theory of defense, for reasons stated above. The undersigned concludes that Shannon did not manifest negligence or ignorance in his submissions of proposed jury instructions.

15. The undersigned finds that while hindsight might suggest some judgmental errors by defense counsel, petitioner's side of the story was presented in an articulate and

fairly persuasive manner. Whether the legal services are viewed in their totality or in terms of the various components identified by petitioner, it must be concluded that the representation was within the normal range of competence demanded of attorneys in such circumstances.

16. Based on the foregoing summaries, findings, and conclusions, the undersigned recommends that the petition for writ of habeas corpus be denied, and that the case be stricken from the active docket.

The clerk is directed to immediately transmit the record in this case to Chief United States District Judge James C. Turk. Both sides are reminded that they are entitled to note objection to the report and recommendation within ten days. The clerk is directed to forward copies of this report and recommendation to all counsel of record.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
AT ROANOKE

CHARLES LANKFORD,

Petitioner,

v.

O. S. FOSTER, *et al.*,

Respondents.

Civil Action No. 81-0159-R

By: JAMES C. TURK, *United States District Judge*

ORDER AND MEMORANDUM OPINION
FILED AUGUST 12, 1982

In accordance with the Memorandum Opinion entered this day, it is hereby

ADJUDGED AND ORDERED

as follows:

(1) that the writ of habeas corpus sought by petitioner in this proceeding is hereby granted;

(2) that petitioner, Charles Lankford, be released from the custody of the respondent for those three convictions imposed by the Circuit Court for the County of Fairfax, Virginia, on December 19, 1978, namely:

(a) Criminal Case No. 27794—10 years for unlawfully and carnally knowing with the mouth, by force, the prosecutrix on or about December 20, 1975;

(b) Criminal Case No. 27795—10 years for unlawfully and carnally knowing by the mouth, by force, the prosecutrix on or about October 2, 1976; and

(c) Criminal Case No. 27796—10 years for unlawfully and carnally knowing with the mouth, by force, the prosecutrix on or about November 12, 1976;

unless the Commonwealth of Virginia elects to re-arraign and re-try him within ninety (90) days from the date of entry of this order;

(3) that this order shall in no way affect any other sentence of imprisonment which Petitioner Lankford may now be serving or to which he is subject to serve in the future.

Charles Lankford, currently incarcerated at the Roanoke County-Salem Jail Facility, filed this petition for a writ of habeas corpus pursuant to 28 U.S.C. §§ 2241-2254. Petitioner is detained pursuant to the judgment of the Circuit Court for the County of Fairfax entered on December 19, 1978, whereby petitioner was convicted of three counts of forcible sodomy and sentenced to ten years on each count with the terms to run consecutively, and with one term suspended.

STATEMENT OF FACTS

Charles Lankford until 1968 spent most of his life incarcerated for certain felonies, none of which was sex related. After his release, petitioner participated in numerous community rehabilitative activities. These activities ranged from a juvenile delinquent counselor to Director of a local branch of Offenders Aid and Restoration. Petitioner sought and was granted a full executive pardon for his prior offenses. In the course of his activities, petitioner received a number of awards and recognitions for his community

service. In 1975, petitioner unsuccessfully campaigned for the Office of Sheriff of Fairfax County.

In 1968, petitioner married within a short time of his release. The woman he married had two daughters, one fourteen and the other nine, and one son, aged twelve or thirteen. Approximately one year after their marriage, a daughter was born. Eventually both the oldest daughter and the son by the wife's previous marriage left home. In 1975, the marriage began to fail. In March of 1978, petitioner and his wife entered into a voluntary separation agreement which provided, *inter alia*, joint custody of the daughter of their marriage with primary custody to be vested with petitioner. Despite petitioner's attempts to save the marriage, he filed for divorce on April 7, 1978, and sought sole custody of his daughter.

The prosecutrix in the convictions currently being challenged was the youngest step-daughter of petitioner. She was eight years old at the time her mother married petitioner. She lived in the Lankford home until August of 1977 when she left to join her natural father and attend college in Florida. Sometime in April of 1978, the stepdaughter related to her natural father that she had been sodomized on numerous occasions by petitioner while she had been living at the Lankford home between 1970 and 1976. As a result of these allegations, petitioner was indicted on three counts of sodomy. The indictments charged sodomy by petitioner with the mouth, by force, on or about December 20, 1975, sodomy by the mouth, by force, on or about October 2, 1976, and sodomy with the mouth, by force, on or about November 12, 1976, all in violation of Va. Code § 18.2-361 (1950).

Petitioner retained as counsel for the sodomy charges the same counsel who was representing him in the divorce pro-

ceedings. At the preliminary hearing, which was not recorded or in any other manner transcribed[1], certain evidence was presented. The preliminary hearing revealed for the first time the allegations of numerous uncharged sexual assaults. It also confirmed that petitioner was unsure of, or refused to commit herself to, the exact dates of the charged offenses for the October and November, 1976, assaults. Counsel submitted a Motion to Dismiss the two counts on due process grounds; however, the motion was denied.

The trial of the case was before a jury on December 18-19, 1978. The trial judge conducted the *voir dire* without any input from defense counsel or the Commonwealth's Attorney. The *voir dire* consisted solely of those questions prescribed by the Virginia Supreme Court in Rule 3A:20(a).

The defense put forth by petitioner's counsel involved both an alibi defense and an attack on the credibility of the prosecutrix.[2] Counsel later conceded that the alibi defense was not a strong one but it was there and might as well be used. *Magistrate's Hearing*, p. 320. Counsel therefore introduced evidence establishing the alibis through the testimony of the petitioner and various witnesses. The attempted attack on the credibility of the prosecutrix occurred through questioning phrased so as to indicate that the prosecutrix was assisting her natural mother in obtaining the custody of the daughter of the Lankford marriage through the timing of the revelations. Counsel also attempted to stress the incredibility of the number of assaults without any com-

[1] Counsel states he may have taken notes and that he directed petitioner to take notes; however, there is no verbatim account of the proceeding.

[2] As there were no witnesses to the assaults, the single determination for the jury revolved around the credibility of the complainant and the defendant.

plaints from the prosecutrix until almost eighteen months after the last incident and without any knowledge of any other member of the family.

The Commonwealth prosecuted the case by calling five witnesses. The prosecutrix testified that the uncharged incidents began occurring at the age of nine and continued over one hundred times. She stated that she did not realize the significance of the encounters although petitioner told her not to tell her mother since knowledge of the incidents would hurt her mother. Other testimony brought out the facts that she developed a hatred for Lankford as her sexual awareness developed, she threatened Lankford with a knife during one quarrel, Lankford offered to set her up in business after her move to Florida, as well as to make her a beneficiary on his life insurance policy, and that the charges were brought at her natural father's insistence that her mother notify authorities.

Mrs. Lankford, the natural mother of the prosecutrix, testified for the prosecution with no objection from the defense counsel.[1] Her testimony consisted of describing the marital and family relationships with petitioner from its beginning to some time after the separation. Included were statements that the prosecutrix moved to a room with a lock on the door when her sister moved out of the house.

The prosecution rested its case on the first day of trial and the defense began its case on the second day. Counsel for the defendant did not meet with petitioner on the intervening night to discuss the case or otherwise prepare the petitioner for the following day. As its case, the defense presented five witnesses on petitioner's behalf. The first witness implied the reason for the charges being brought was

[1] Counsel neither invoked the spousal privilege pursuant to Va. Code §19.2-271.2 nor moved for a mistrial.

for the prosecutrix's mother to obtain custody over the Lankford's daughter. The next three witnesses provided the alibi defense upon which counsel relied. Although the prosecutrix had not determined the exact dates of the charged assaults, the witnesses stated where petitioner had been at the times the assaults allegedly had taken place. Finally, the petitioner was put on the stand to proffer evidence in the form of denials of the charged acts and possible motives for the accusations. He also elaborated on and disputed earlier testimony from his wife and step-daughter. Specifically, petitioner testified as to the discipline he accorded the step-daughter, denied the step-daughter's testimony that he offered to make her beneficiary on a life insurance policy, confirmed that sexual relations between he and his wife ceased shortly after the birth of their daughter, disputed the wife's testimony regarding violent outbursts after their separation and contended that the charges were a means of obtaining custody of their daughter.

After petitioner's testimony, the defense rested and the prosecution called rebuttal witnesses. These witnesses included a policeman, the brother of the prosecutrix, and the natural father of the prosecutrix. The testimony elicited from these individuals indicated that the prosecutrix was treated more leniently than the others, that the petitioner had offered to set the prosecutrix up in business, and that a warrant served upon petitioner for an argument with his wife was on a certain date instead of the date mentioned by the petitioner.

The Commonwealth's Attorney and counsel for defense submitted the jury instructions to the judge for examination and approval. None of the instructions so submitted defined either the crime in terms of the elements required for the Commonwealth to meet its burden of proof nor the elements

themselves. The judge instructed the jury as to the crime through a reading of the statute but did not on his own motion define the crimes or their elements. The jury found petitioner guilty on all three counts and fixed his punishment at ten years, the maximum, on each count. The sentence on the third count ultimately ran concurrently with the other two sentences.

GROUNDS ASSERTED FOR HABEAS RELIEF

Petitioner primarily challenges the validity of his by alleging that his attorney rendered ineffective assistance of counsel. Specifically, petitioner states the following acts and omissions rendered the assistance of counsel ineffective:

a. Defense counsel did not cause the testimony at the preliminary hearing to be recorded so as to provide a basis for subsequent impeachment of the prosecutrix;

b. Defense counsel did not attempt to exclude the prosecutrix's testimony as to prior uncharged acts;

c. Counsel failed to investigate available witnesses who could provide insight into the relationship between petitioner and the prosecutrix, and provide a motive for the accusation. Counsel also failed to secure the services of a psychiatrist to testify as to the motivation of the prosecutrix in making the accusation;

d. Counsel failed to discover during *voir dire* whether the jurors had strong feelings about sexual crimes;

e. Counsel failed to exclude petitioner's wife as a witness or moving for a mistrial when she was called;

f. Counsel did not rebut certain testimony deemed prejudicial to petitioner. Specifically, counsel did not rebut testimony regarding (1) a knife incident

in which the prosecutrix threatened petitioner; (2) the prosecutrix's move to a bedroom with a door lock; (3) the termination of sexual relations between petitioner and his wife; and (4) the offer of petitioner to finance the prosecutrix's venture into business;

g. Counsel did not investigate and call possible character witnesses;

h. Counsel did not prepare available defense witnesses for the trial after the first day in which damaging testimony was given;

i. Counsel failed to request jury instructions defining the elements of force and penetration; and

j. Counsel failed to request a limiting charge as to the prior uncharged acts.

As alternate grounds for habeas relief, petitioner states that the judge failed to properly instruct the jury as to several key elements, including the need for force; the need for penetration; the prior uncharged acts; and reasonable doubt. Finally, petitioner claims that there was insufficient evidence of force and penetration so as to sustain the convictions.[4]

I. INEFFECTIVE ASSISTANCE OF COUNSEL

The gravamen of petitioner's allegations lies in what he considers to be the ineffective assistance of counsel at various stages of the proceedings against him. The Sixth Amend-

[4] A United States Magistrate conducted an evidentiary hearing concerning the allegations and prepared a report containing findings of fact, conclusions of law, and recommended disposition. The Magistrate concluded that many of the ineffectiveness allegations related to "trial tactics, or more specifically, tactical emphasis" and that "defense counsel's efforts fell within the normal range of competence demanded of attorneys in like situations." *Magistrate's Report*, at 14. As to the other grounds for *habeas* relief, the Magistrate found each to be without merit. The Magistrate recommended that the petition for a writ of habeas corpus be denied and the case stricken from the docket. *Magistrate's Report*, at 19.

ment to the United States Constitution provides the basis for the right to counsel. It states, in pertinent part, that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." This general right to counsel has evolved to mean the right to the effective assistance of counsel. *McMann* v. *Richardson*, 397 U.S. 759 (1970). The Fourth Circuit utilized McMann to provide a new standard for determining the effectiveness of counsel. In *Marzullo* v. *Maryland*, 561 F.2d 540 (4th Cir. 1977), the standard adopted was phrased as follows: Was the defense counsel's representation within the range of competence.

The Fourth Circuit cautioned that effective representation was not the same as errorless representation. *Marzullo*, at 544. It noted that an attorney may make decisions which in hindsight prove wrong but are not necessarily grounds for relief. Rather, in order to merit relief,

> A convict generally must establish that his counsel's error was so flagrant that a court can conclude that it resulted from neglect or ignorance rather than from informed, professional deliberation.

Marzullo, at 544.

Marzullo also states that because the standard as promulgated "measures an attorney's conduct by comparison with the competence generally found in the profession, it requires an objective assessment of counsel's adequacy."[8] *Id.*,

[8] In *Marzullo*, the Fourth Circuit expressly abandoned the "farce and mockery" test previously used. It indicated that it had implicitly abandoned the test in *Coles* v. *Peyton*, 389 F.2d 224 (4th Cir. 1968), but since district courts continued to apply it, the standard should be expressly disavowed. *Marzullo*, at p. 543.

[9] The Court further stated that the matter should, for the most part, be left to the discretion of the trial court. In exercising its discretion, a trial court may refer to such sources as precedent from state and

at 544. A standard applied in such a manner will necessarily be broad and flexible since it encompasses many different factual situations and circumstances.

Accordingly, this court must now examine the conduct of counsel and determine whether that representation was within the range of competence demanded of attorneys in criminal cases, keeping in mind that petitioner must establish that the error was so flagrant that this court could conclude that it resulted from neglect or ignorance rather than from informed, professional deliberation.

Upon a review of the record, it is apparent that all participants in the post-conviction proceedings have devoted primary attention to the trial preparation and presentation. As noted in the Statement of Facts, defense counsel proceeded primarily on the theories of incredibility and alibi. Accordingly, throughout the habeas proceedings, much discussion has been oriented towards the tactics of defense counsel in organizing the case and determining what types of evidence would be most advisable. Regardless of the arguments presented by the parties to this proceeding, certain facts are undisputed:

(A) defense counsel failed to record the preliminary hearing;

(B) although petitioner provided defense counsel with a list of witnesses and while those witnesses were subpoenaed, not a single pure character witness was called; and

(C) defense counsel failed to *voir dire* the jury.

Therefore, these aspects of the trial shall now be addressed by the court.

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federal courts, state bar canons, the American Bar Association Standards Relating to the Defense Function, and in some instances, expert testimony on the particular conduct at issue.

A. Preliminary Hearing

Petitioner states that the failure of the attorney to request that the judge have the testimony at the preliminary hearing reduced to writing constitutes ineffective assistance of counsel.

In Virginia, where an indictment has yet to be returned, the preliminary hearing serves as the stage whereby a judge determines whether there is probable cause to charge the accused with an offense. At the hearing, in the presence of the accused, the judge listens to evidence presented for and against the accused. Although the accused shall not be called upon to plead, he may cross examine witnesses, introduce witnesses in his own behalf, and testify in his own behalf. Va. Code § 19.2-183. Supreme Court Rule 3A:5. Such testimony may be reduced to writing if deemed proper by the judge. Va. Code § 19.2-185; Supreme Court Rules 3A:5(b) (1).

Counsel for petitioner had the opportunity to request that the testimony of the preliminary hearing be reduced to writing. Yet no request was made. In fact, the only notes taken at the entire proceeding were written by the petitioner at the direction of counsel. Counsel for petitioner contends that even had the proceeding been reduced to writing, it would not have made any difference as there were no vast discrepancies between the testimony at the preliminary hearing and that at the trial. In fact, counsel for petitioner indicates that the only thing he "really wanted out of the preliminary hearing was to narrow the times and dates so we could get on working up an alibi or whatever our defense would be." *Magistrate's Hearing*, p. 332. Yet had there been discrepancies, the transcript would have provided the possibility of impeachment provided the proper procedure to prove the prior inconsistent statement was fol-

lowed. *See Hodges* v. *Commonwealth*, 213 Va. 316, 191 S.E.2d 794 (1972).[1] Notes which only allude to the testimony given would be clearly inadequate to impeach the prosecutrix since there is no verbatim account of the prior

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[1] Expert witnesses for both the respondent and the petitioner indicated the utility in having a transcript of the preliminary hearing available for use in impeaching a witness in serious felony cases. Furthermore, the ALI-ABA Manual and *Defending Criminal Cases in Virginia* (both the 1975 and 1981 editions) similarly endorse having recorded testimony of the preliminary hearing for future use:

> Transcribing testimony of witnesses at the preliminary hearing oftentimes can prove very valuable to the defense. This would be especially true when the transcript can be utilized to impeach a witness at the trial. It is not uncommon to find a discrepancy at the hearing. Many factors could be responsible for the variance, such as the lapse of a great deal of time between the preliminary hearing and the trial, or testimony that has been fabricated by the witness at the preliminary hearing or trial. Other factors would be the inability of a witness to remember or retain the facts, change of circumstances, or a change of attitude on the part of the witness.
>
> Counsel who is equipped with a full transcript of the testimony of the witnesses is in a much better position to prepare for his defense at the trial. When the testimony is being transcribed, counsel can devote most of his time to the examination and cross-examination of witnesses, and does not have to concentrate on the taking of notes during the hearing. He can better carry out the task of fully developing the facts which could prove invaluable in the preparation and defense of his client. The likelihood of counsel overlooking some important aspect of his case at the trial is greatly diminished when there is a record of the preliminary hearing available for ready reference.
>
> The financial condition of your client must be considered when deciding upon the use of a reporter at the preliminary hearing. It could well be a situation where the ultimate benefits derived from the use of the transcript could be overshadowed by the cost incidental thereto in preparation of the case. . .

Defending Criminal Cases in Virginia, p. 149 (1975 ed.) and 9-42 (1981 ed.) (footnotes omitted).

Testimony given by the petitioner indicated that he could have raised money for a transcript of the preliminary hearing. *Magistrate's Hearing*, p. 278. Petitioner further contends that the possibility of the preliminary hearing being taped or transcribed was never discussed with him.

inconsistent statements. Defense counsel conceded at the Magistrate's Hearing that it was not the best way to impeach someone. *Magistrate's Hearing*, at p. 35.

The Court concludes that defense counsel's failure to record the preliminary hearing constitutes a serious error of judgment in a case where the credibility of the prosecutrix is at issue.

B. Failure to *Voir Dire* the Jury

Petitioner alleges that counsel's failure to voir dire the jury, other than those questions asked by the judge as required by the Supreme Court Rule 3A:20(a),[8] constitutes ineffective assistance of counsel.

The record of the trial shows after the jury panel was called, the Court asked certain questions relating to the qualifications and the impartiality of the individual members of the jury panel. Once the questioning had been completed, the court called out both the prosecutor's name and the defense counsel's name at which time they expressed

[8] Rule 3A:20 (a) of the Rules of the Supreme Court provides, in pertinent part, that:

After the prospective jurors are sworn on the voir dire, the court shall question them individually or collectively to determine whether anyone:

(1) Is related by blood or marriage to the accused or to a person against whom the alleged offense was committed;

(2) Is an officer, director, agent or employee of the accused;

(3) Has any interest in the trial or the outcome of the case;

(4) Has acquired any information about the alleged offense or the accused from the news media or other sources and, if so, whether such information would affect his impartiality in the case;

(5) Has expressed or formed any opinion as to the guilt or innocence of the accused;

(6) Has a bias or prejudice against the Commonwealth or the accused; or

(7) Has any reason to believe he might not give a fair and impartial trial in the Commonwealth and the accused based solely on the law and the evidence.

their satisfaction with the panel. Defense counsel did not request that the court ask any other questions that might indicate the partiality of the panel nor did the court on its own ask questions other than those required by Rule 3A:20.

The accused's right to an impartial jury is a fundamental right protected by the Constitution. Although Virginia law at the time of the trial did not provide an absolute right for defense counsel to *voir dire* the jury panel, it did allow for an opportunity. Rule 3A:20(a) provided, in pertinent part, that

> . . . the court, or counsel with permission of the court may examine on oath any prospective juror or may ask any question relevant to his qualifications as an impartial juror. A party objecting to a juror may introduce competent evidence in support of the objection.

Similarly, Va. Code § 8.01-358 (1977 Repl. Vol.) stated that

> The court and counsel for either party may examine under oath any person who is called as a juror therein and may ask such person or juror directly any relevant question to ascertain whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein; and the party objecting to any juror may introduce any competent evidence in support of the objection; and if it shall appear to the court that the juror does not stand indifferent in the cause, another shall be drawn or called and placed in his stead for the trial of that case.
>
> A juror, knowing anything relative to a fact in issue, shall disclose the same in open court.

Although the accused has the right to a fair and impartial jury, the Virginia Supreme Court in *Turner* v. *Common-*

wealth, 221 Va. 513, 273 S.E.2d 36 (1980), *cert. denied*, 451 U.S. 1011 (1981), determined that this right did not create a constitutional right to counsel conducted voir dire. Since that decision, however, the Virginia Legislature amended Va. Code § 8.01-358 to state that "The court and counsel for either party shall examine under oath . . ." (emphasis added). Thus the Legislature implicitly recognized the advantage to counsel conducted *voir dire*.

The importance of voir dire is manifested in both editions of *Defending Criminal Cases in Virginia*. In the section concerning jury selection it states

> In the interest of efficiency and to avoid unnecessarily prolonged voir dire examinations, Rule 3A:20(a) requires the court to ask specific questions that, to a large extent, will determine the qualifications of the prospective jurors. The Rule does not, however, restrain the court from asking other questions. Questions on voir dire may be presented to the jury by defense counsel, the prosecutor, or by the judge.

Defending Criminal Cases (1975 ed.), p. 228.

and

> One advantage in having the judge conduct the voir dire is that the jury will not feel intimidated by the questioning of counsel, or be antagonistic toward him, but will feel more committed to answer the judge truthfully. Defense counsel should take advantage of all opportunities to raise questions on voir dire and should keep a list of useful questions for reference purposes.

Defending Criminal Cases (1981 ed.), p. 11-22.

Among those questions the treatise suggests are the jurors' connection with law enforcement, prior dealings with the

attorneys in the case, knowledge of the case through media reports, proximity of residence to the crime and presumption of evidence.

Expert witnesses in this case agree that effective assistance of counsel requires not only those questions required but also others pertaining to the case to be tried. Other questions suggested concern sex crimes, petitioner's status as an ex-convict, and whether the jurors or their families had ever been victims of a crime. Although the witnesses noted that the voir dire was not an absolute right, they felt that it was necessary in this case and that the court would not object. The failure of the trial counsel to even attempt to ask the suggested questions constituted ineffective assistance of counsel in their minds.

The Court concurs with the expert witnesses and *Defending Criminal Cases in Virginia* that defense counsel should have submitted questions to the jury for purposes of *voir dire*. In determining whether the jury was indeed impartial, counsel should have examined them to determine whether they or their families had ever been victims of a sex crime and whether they had young daughters. Failure to seize upon this opportunity constitutes a serious tactical error and poor judgment.

C. Failure to Call Character Witnesses

Petitioner also claims that counsel rendered ineffective assistance of counsel through his failure to call certain character witnesses. Petitioner contends that had character witnesses been called, the prosecution's depiction of petitioner as a violent ex-convict who drank too much and sexually abused his stepdaughter would be undermined.

Testimony elicited from trial counsel at the Magistrate's Hearing revealed that various persons were available to

testify on behalf of petitioner. Among the persons who could attest to petitioner's good character were the Sheriff of Fairfax County, a Congressman, a pastor, a member of the Fairfax Board of Supervisors, and others. While the others would testify as to the relationship between the petitioner and the prosecutrix, the aforementioned would testify as to the general reputation of the petitioner in the community for truth and veracity. Obviously, the community reputation of these witnesses would serve to enhance the defense.

Counsel placed the burden of identifying many character witnesses[9], contacting them, and interviewing them with petitioner.[10] *Magistrate's Hearing*, p. 406 (Shannon direct examination) 285, (Lankford cross-examination). Counsel described petitioner as "a very active participant" in this matter. *Magistrate's Hearing*, p. 406. However, counsel informed petitioner "well in advance of trial" that many of these witnesses would not be used. *Magistrate's Hearing*, p. 323.

Counsel did subpoena several character witnesses who ultimately were not called to testify. Consequently, not a single "pure" character witness was put on the stand. Experts

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[9] Two types of witnesses were available for this trial. First, there were witnesses who would provide the alibi defense for petitioner. The second category would rehabilitate the petitioner's character. Counsel for petitioner had Lankford contact both types although the character witnesses were by far the more prevalent.

[10] *Defending Criminal Cases in Virginia* (1975 ed. and 1981 ed.) appears to place the burden on counsel for the accused. In the section concerning the Initial Investigation and Interview of the Accused, a checklist is present which reminds the attorney to obtain a list of witnesses. The witnesses are to include witnesses to the event that occurred, alibi witnesses, and character witnesses. The 1981 edition further directs the attorney to obtain from the accused the name (spelling, aliases, and nicknames), address, phone number, and other information helpful in locating the witness. See p. 125 (1975 ed.) and 9-16.

for both the petitioner and the respondents agreed that had such testimony been available, it would have been advantageous to present it. Petitioner, as an ex-convict, needed rehabilitation which this type of testimony could provide. Especially important is such testimony where counsel intends to present a defense involving the credibility of the accused against the prosecutrix through alibis.

The Court concludes that the failure of counsel to present those character witnesses who were subpoenaed constitutes serious tactical error and poor judgment where the credibility of the petitioner is at issue. The witnesses could have rehabilitated petitioner's status as an ex-convict and reestablished petitioner's credibility to his advantage against the prosecutrix.

The court believes that the failure to record the preliminary hearing, the failure to voir dire the jury, and the failure to call character witnesses constitutes flagrant error and cumulatively reflects representation below that required by *Marzullo* v. *Maryland*, 561 F.2d 540 (4th Cir. 1977). However, of even more concern to this court than the three omissions stated above is the failure of the defense counsel to prepare and submit adequate jury instructions towards the end of the trial. Although this issue was not addressed as comprehensively in the *habeas* proceedings as the issues above, the Court believes that the seriousness of the error warrants in depth discussion.

D. Failure to Request Jury Instruction Defining the Elements of the Crime

The record reflects that the Grand Jury returned three indictments against petitioner. These indictments charged sodomy by the petitioner with the mouth, by force, on or about December 20, 1975, sodomy by the mouth, by force,

on or about October 2, 1976, and sodomy with the mouth, by force, on or about November 12, 1976, all in violation of Va. Code § 18.2-361 (1975 Repl. Vol. as amended).[11] That section of the Virginia Code provides that

> If any person shall carnally know in any manner any brute animal, or carnally know any male or female person by the anus or by or with the mouth, or voluntarily submit to such carnal knowledge, he or she shall be guilty of a Class 6 felony.
>
> If any person shall by force carnally know any male or female person by the anus or by or with the mouth he or she shall be guilty of a Class 3 felony.

Va. Code § 18.2-361.

In order for the Commonwealth to meet its burden of proof with respect to these charges, two essential elements must be shown. First, the Commonwealth must demonstrate that penetration occurred. *Ashby* v. *Commonwealth*, 208 Va. 443, 158 S.E. 2d 657 (1968), *cert. denied*, 393 U.S. 1111 (1969). Secondly, since the indictment charged the use of force in the commission of the acts (thereby bringing the acts within the second sentence of Va. Code § 18.2-361), the Commonwealth must prove that force was used in committing the act.

It is apparent from the record that defense counsel never defined the charges or their elements in the jury instructions submitted to the presiding judge. Defense counsel submitted a total of five instructions to the judge, three of which were given and two of which were withdrawn. The three that were given included the presumption of innocence, the burden of the Commonwealth in proving its case, and an alibi in-

[11] Sodomy with the mouth is another term for cunnilingus whereas sodomy by the mouth indicates fellatio.

struction. Not one of the instructions submitted, whether given or withdrawn, defined the crime or its elements although such jury instructions were readily available.[12]

The record further reflects that neither the court nor the Commonwealth's Attorney defined the crime or the elements comprising the charged acts. The Commonwealth's Attorney, in his opening remarks before the jury, alluded to the definitions of the charges; however, as the transcript indicates, the charges were not clearly defined nor were the elements expounded:

> If you are able to distinguish between the wording of the three indictments that were read prior to this trial taking place, you will have heard that the first in-

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[12] One such instruction for the fellatio charge is derived from the statute, Va. Code §18.2-361 and *Towler* v. *Peyton*, 303 F. Supp. 581 (W. D. Va. 1969):

> The defendant is charged with the crime of sodomy by force. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:
>
> (a) That the penis of the defendant (name of person) penetrated into the mouth of the prosecutrix; and
>
> (b) That it was by force.

The instruction continues that if the Commonwealth has met its burden, then you shall find the defendant guilty and the range of punishment is prescribed; of course, failure of the Commonwealth to meet its burden means that the defendant shall be found not guilty.

Where the cunnilingus charge is concerned, minor variations are needed. The instruction may be stated in the following manner:

> The defendant is charged with the crime of sodomy by force. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:
>
> (a) That the mouth of the defendant (name of person) penetrated into the vagina of the prosecutrix; and
>
> (b) That is was by force.

The instruction then resumes much as the fellatio charge.

> dictment alleging an offense arising in November of 1975 alleges sodomy with the mouth. The distinction there, sodomy with the mouth, is committed when the defendant places his mouth on the gentle (sic) parts of the victim; the second incident arising on October 2nd, 1976 alleges the defendant committed sodomy by the mouth. Sodomy by the mouth suggests that the defendant forced the victim to place her mouth on his penis. Again, in November of 1976, sodomy by the mouth.

Trial Transcript, p. 20.

This discussion fails to establish the legal elements required to meet his burden of proof. It does not suggest that penetration is an essential element nor does the statement indicate that force is needed. In fact, the statement goes so far as to suggest that merely placing the mouth on the genitals constitutes sodomy, thereby eliminating the need for penetration.

The court similarly did not instruct the jury as to the charges and their elements. The sole reference to the charges occurred when the judge gave the instructions concerning whether petitioner "did carnally know" the prosecutrix "by force". These instructions were those submitted by the Commonwealth's Attorney and varied only in the use of the phrases "by the mouth" and "with the mouth".

It is this court's conclusion that the failure of defense counsel to instruct the jury as to the charges and their elements arises from the neglect or ignorance of the attorney rather than from informed, professional opinion.

The court notes that such terms as "carnal knowledge", "sodomy", "penetration", and "force" were used indiscriminately without the benefit of definition for the jury. The first

two terms are confusing. Carnal knowledge commonly means sexual intercourse. *See Black's Law Dictionary*. However, the context in which the phrase was used did not mean intercourse but rather fellatio or cunnilingus. *See Ashby* v. *Commonwealth*, 158 S.E. 2d 657 (1968), *cert. denied*, 393 U.S. 1111 (1969) (carnal knowledge as fellatio); *Ryan* v. *Commonwealth*, 219 Va. 439, 247 S.E. 2d 698 (1978) (carnal knowledge as cunnulingus).

The term sodomy also was not used in its commonly used context. Ordinarily sodomy suggests anal intercourse. However, the Commonwealth's Attorney used it in his opening statement to mean fellatio and cunnilingus.[13]

The elements of the crime, "penetration" and "force", were crucial to the case and should have been defined so that the jurors could understand the legal requirements to determine guilt or innocence. A jury instruction concerning penetration for fellatio was available at the time of petitioner's trial based on *Ashby* v. *Commonwealth*, supra.:

> To be sodomy, there must be penetration, no matter how slight, of the penis into the mouth of another. Mere touching of the penis to the mouth is not sufficient. It is not necessary that there be an ejaculation.

Based on the fellatio instruction, an instruction on penetration for cunnilingus would require only a slight variation:

> To be sodomy, there must be penetration, no matter how slight, of the mouth into the vagina of another. Mere touching of the mouth to the vagina is not sufficient.

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[13] In Va. Code § 18.2-67.1 (1982 Repl. Vol.), sodomy is defined as cunnilingus, fellatio, anallingus, or anal intercourse. Thus, the definition of sodomy has been expanded by statute.

An instruction for force was also crucial in this case as the testimony advanced by the prosecutrix may have put doubt into the minds of the jurors that force was actually used in the commission of the acts. *See* Trial Transcript, of December 18, 1978, at 39, 45 and 50. An instruction regarding force is easily adapted from the instructions available on forcible rape:

> The element of force required must be sufficient to overcome any unwillingness on the part of (name of person) to engate in the commission of the act. There must be a show of force sufficient to overcome resistance. She must resist by every means within her power under all the circumstances then existing. However, she is not required to resist if she reasonably believes that resistance would be useless and would result in serious bodily injury to her. You may consider whether or not any weapons were used, the time, the place, the number of persons involved, their relative physical size and strength and all the circumstances disclosed by the evidence.

See Mings v. *Commonwealth*, 85 Va. 638, 8 S.E. 474 (1889) (verbal resistance required at a minimum to show force); *Poindexter* v. *Commonwealth*, 213 Va. 212, 191 S.E.2d 200 (1972) (amount of resistance requires consideration of circumstances); *Schrum* v. *Commonwealth*, 219 Va. 204, 246 S.E.2d 893 (1978) (evidence of show of force necessary to overcome resistance required). It is axiomatic that if the Commonwealth fails to prove that force was used, petitioner could not be convicted of the offenses with which he was charged. It is noteworthy that the same charge, without the use of force, was a Class 6 felony as opposed to a Class 4 felony. Therefore, a more lenient pun-

ishment would have been imposed had the element of force not been proven.[14]

It is the experience of this court that a case such as petitioner's requires instructions indicating the elements of the crime as well as the definitions of the elements. The transcript of the trial indicates that with the proper instructions, the jury may have inferred that penetration, an essential element, did not take place in at least one of the incidents and that force, the other essential element, may not have occurred at all.[15] Therefore, with proper jury instructions, the jury may have found the petitioner not guilty of forcible sodomy or perhaps guilty of a lesser included offense.

The importance of jury instructions is stressed by *Defending Criminal Cases in Virginia.* In the 1975 edition, the treatise states that

> It is the duty of counsel to aid the court in the function of instructing the jury. The very purpose of permitting requests to charge is that the jury may be fully informed as to all the law governing the case and the

[14] Defense counsel could also have submitted instructions for a lesser included offense which may have aided petitioner. The Court must, upon request of counsel, submit to the jury any offenses that are lesser included offenses of the crime charged in the charging paper and upon which the evidence would support a conviction. *Jefferson* v. *Commonwealth,* 214 Va. 432, 201 S.E.2d 749 (1974). Among those lesser included offenses which counsel could have requested instructions were carnal knowledge without force.

[15] The jury may have easily found from the testimony of the prosecutrix that "penetration" and "force" did not occur in each charged incident. With regard to the first incident, the prosecutrix testified that the petitioner placed his mouth on her vagina although she tried to get away. *Trial Transcript* of December 18, 1978, page 39. The second incident occurred when petitioner was placing his penis in her mouth although she was trying to get away. *Trial Transcript* of December 18, 1978, page 45. Finally, the prosecutrix testified as to the third incident that the petitioner placed his mouth on her vagina while she was trying to get away. *Trial Transcript* of December 18, 1978, page 50.

> trial court enabled to correct at once any mistake that may have been made in instructing them. The rule is, therefore, firmly established that where the charge of the court does not cover all phases of the case, counsel is bound to call attention to the omission, by appropriate request.

Defending Criminal Cases, at 249.

Furthermore, the instructions serve an important purpose:

> The purpose of an instruction is to aid the jury in reaching the correct conclusion, and the model instruction is a simple, impartial, clear, concise statement of the law applicable to the evidence in the case then on trial. It should constantly be borne in mind that it is the jury's responsibility to ascertain the facts of a case and to apply those facts as found by them to the instructions of the court which contain the law of the case.

Defending Criminal Cases, at 250.

It is clear that defense counsel's failure to provide appropriate, available, instructions violates this duty and clearly prejudiced petitioner in the trial.

The Court further notes that defense counsel's failure to submit adequate jury instructions even extended to the theory of his case. Counsel's theory suggested the sheer incredibility of the number of attacks without the knowledge of others in the household or complaints from the prosecutrix. However, although jury instructions to that effect were available, none was submitted:

> You may find the defendant guilty on the testimony of (name of person) alone if it is credible and you believe it beyond a reasonable doubt. But if her testimony is incredible, or so contrary to human experience or to

usual human behavior as to make it unworthy of belief, it is not sufficient to support a finding of guilty.

If considering whether or not her testimony is credible, you may consider an unreasonable delay, if any, in reporting the alleged offense.

See Willis v. *Commonwealth*, 218 Va. 560, 238 S.E. 2d 811 (1977).

SUMMARY

It is clear to this court that the term ineffective assistance of counsel means more than just pointing to one incident in the course of the trial to justify relief. The Sixth Amendment guarantees that in all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense. This recognizes that the "average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel." *Johnson* v. *Zerbst*, 304 U.S. 458, 462-263 (1938). The assistance of counsel is not "discharged by an assignment at such a time or under such circumstances as to preclude the giving of *effective* aid in the preparation and trial of the case." *Powell* v. *Alabama*, 287 U.S. 45, 71 (1932) (emphasis added). Therefore, the right to be heard

> . . . would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or

> evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Powell, at 69.

To assess whether counsel committed errors that constitute ineffective assistance of counsel, sometimes more than individual actions in and of themselves must be considered. Any one allegation of an act or omission in the conduct of a trial may not rise to a level of ineffective assistance of counsel. Indeed, it may be properly justified as a trial tactic. However, the totality of the omissions and the errors may clearly reflect a lack of adequate representation in the preparation and trial of the case. *United States* v. *Hammonds*, 425 F.2d 597, 604 (D.C. Cir. 1970).

> There are no tests by which it can be determined how many errors an attorney may make before his batting average becomes so low as to make his representation ineffective. The only practical standard for habeas corpus is the presence or absence of judicial character in the proceedings as a whole.

Diggs v. *Welch*, 148 F.2d 667, 670 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945). Therefore, in assessing whether counsel rendered ineffective assistance of counsel, the record as a whole and the cumulative effect of the acts and omissions should be considered. *United States* v. *Hammonds*, 425 F.2d 597 (D.C. Cir. 1970).

The failure to seek to record the preliminary hearing, the failure to voir dire the jury, and the failure to call character witnesses all constituted serious tactical mistakes

as outlined above. The materiality of these errors is perhaps clearer in hindsight. But, it requires no hindsight to ascertain that the failure to seek proper instruction of the jury constituted professional error of the first magnitude. Herein lies the crux of the case.

As found by the magistrate and as ably argued by the respondent, it may well be that many of the multitude of professional errors in this case can be attributed to defense counsel's trial strategy to place all his emphasis on the incredibility of the testimony of the prosecutrix. However, a decision to place all the eggs in one basket does not justify failure to challenge the quality or quantity of the eggs in the prosecution's basket. Stated differently, the adoption of a trial strategy does not excuse defense counsel's obliviousness to certain weaknesses in the Commonwealth's evidence. In Virginia, carnal knowledge and penetration are subject to strict definition. Defense counsel made no attempt to insist that the jury find that these elements had been met. In Virginia, the concept of force is somewhat nebulous. Defense counsel made no attempt to insist that the jury be called upon to deal with the vagueness of the prosecutrix's testimony. Requests for such instructions could have been made without in any way compromising defendant's theory of defense. The seriousness of such omissions is manifest and the appropriate response by this court is clear. It is apparent to this court that the cumulative effect of these errors and omissions indicates a lack of adequate representation under the *Marzullo* v. *Maryland* standard thereby prejudicing the petitioner and denying him a fair trial.

Accordingly, the writ of habeas corpus shall be issued in an Order to be entered this day. A certified copy of this Memorandum Opinion shall be sent to counsel for petitioner and respondents.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-6644

CHARLES LANKFORD,

Appellee,

v.

O. S. FOSTER, Sheriff;
TERRELL DON HUTTO, Director,
Virginia Dept. of Corrections,

Appellants.

Decided August 30, 1983

HAYNSWORTH, Senior Circuit Judge:

Lankford was convicted of three sexual offenses against one of his stepdaughters in a trial court in Virginia, and an active sentence of twenty years imprisonment was imposed upon him. Later, he asserted a claim that his representation by trial counsel had been so deficient that it deprived him of his right to due process. After exhausting his state remedies, he applied to the district court for a writ of habeas corpus. An evidentiary hearing was held, after which the district judge concluded that a writ should issue. From his order granting the writ, conditioned upon a retrial, the Commonwealth of Virginia has appealed.

I.

Lankford was convicted of armed robbery in New York when he was an eighteen year old soldier. After serving eight years of his sentence, he was released on parole. He

was subsequently convicted of a parole violation and the robbery of a bank in New Orleans. When he was finally released in 1968, he had spent twenty-six years in prison, substantially all of his adult life.

After Lankford's release from prison, he appeared to be completely rehabilitated, having settled down to a life of community service in the County of Fairfax, Virginia. He became a respected member of the community and had his civil rights restored by Governor Holton. His public interest work brought him into contact with a number of respectable people, and over the next ten years, he received a number of awards in recognition of his service. As he was beginning his life of community service in 1968, Lankford married Mrs. Diaz, a divorcee with three children, the eldest and youngest of whom were girls. At the time of the marriage, the youngest girl was eight years old. Approximately one year later, Mrs. Lankford gave birth to a daughter.

By 1977, Lankford's marriage was beginning to deteriorate. In 1978, the Lankfords entered into a separation agreement pursuant to which their daughter, Tracy, was to be in their joint custody, with primary custody in the father. Lankford sought to have the marital relationship continued, but Mrs. Lankford filed an action for divorce, and contentions over Tracy's custody emerged.

As the lines of battle over Tracy's custody were being formed, Mia, the youngest of the Diaz children, was living with her natural father and attending college in Florida. She accused Lankford of having sexually abused her from the time that she was nine or ten years old until she was seventeen years old. Mrs. Lankford reported Mia's accusation to the police.

II.

Lankford was indicted for three offenses. Two of the charges were that he performed cunnilingus upon Mia by force, and the third was that he forced her to perform fellatio upon him. At the trial, Mia testified that there were many such instances, perhaps a hundred, and many other attempts, for an estimated one hundred thirty assaults. Lankford had retained an experienced trial lawyer to represent him in his domestic squabble with Mrs. Lankford, and he retained the same lawyer to represent him in the criminal proceedings.

III.

When the jury was being selected, the trial judge asked potential jurors only the questions required by Rule 3A:20, *Rules of the Supreme Court of Virginia*. Trial counsel did not suggest that he ask any other questions or request permission to question the prospective jurors himself. This is the first of a number of deficiencies charged to trial counsel.

Defense counsel knew, of course, that his client's record as a bank robber and parole violator was bound to come out. During an unsuccessful race for county sheriff, his status as a reformed, former convict had been much publicized by him, and jurors' emotional reactions are likely to be much more than ordinary when a man with a history of violent criminalty is charged with forceful sexual abuse of his stepdaughter over a period of seven years or more. All of the jurors remained silent when asked by the judge if they had any bias or prejudice against either party or had any reason to believe that they might not fairly try the case on the law and the evidence. Some of these jurors might have responded quite differently had Lankford's criminal

history been disclosed and more specific questions put to them about their experiences. Instead of accepting the jurors' subjective assessments of their own impartiality, counsel might have explored the backgrounds and attitudes of the jurors to discover actual bias, an inquiry which sometimes is essential. *United States* v. *Dellinger*, 472 F.2d 340, 367 (7th Cir. 1972). If such an additional inquiry by the judge or by counsel did not reveal cause for disqualification of one or more jurors, it still might have been of substantial assistance to the trial lawyer in using his preemptory challenges.

At the habeas hearing, the defense lawyer testified that he thought the judge's routine questions directed to the jurors were adequate. A decision that is consciously made, however, is not necessarily the result of an "informed judgment." *See Sallie* v. *North Carolina*, 587 F.2d 636 (4th Cir. 1978). A decision not to seek additional questioning of the jurors is acceptable only if "within the range of competence demanded of attorneys in criminal cases." *Marzullo* v. *Maryland*, 561 F.2d 540 (4th Cir. 1977).

IV.

The trial lawyer testified that he expected the jury to find Mia's testimony incredible. It seemed preposterous that so many sexual assaults could have been committed upon her in the family home without her mother or siblings becoming suspicious. If the assaults had in fact occurred, it seemed equally unbelievable that Mia would not have mentioned them to anyone until long after she left the family home, and more than two years after the last of the alleged offenses, and then only after her mother had become engaged in battle with her stepfather over Tracy's custody. Mia's only explanation of her silence was that Lankford

had told her after the first incident that it would hurt her Mom if she were told.

The prosecutor, however, attempted to bolster Mia's credibility with several pieces of circumstantial evidence. Mrs. Lankford testified that when Mia's older sister left the family home, Mia moved into her older sister's room, the door to which had a lock upon it. This testimony formed the basis for suggesting to the jury that Mia was seeking protection from Lankford. Much of the period of alleged abuse was after that move, however. Mrs. Lankford also testified that during an argument she had with her husband, Mia assaulted Lankford with a knife. This evidence was used as a basis for a suggestion to the jury that Mia had a deepseated resentment of Lankford for his repeated sexual abuse of her. Although there was available testimony showing that Mia moved into her older sister's room for another reason, the defense did not offer it. There was also a witness willing to testify that Mia had a violent temper and had also drawn a knife upon her brother. Similarly, this available testimony was not offered.

V.

Perhaps the greatest shortcoming of the defense counsel was that he did nothing to support Lankford's credibility. As a witness, Lankford disclosed his two serious felony convictions, but there was no testimony by him about his reformation and his devotion to public and charitable service. Furthermore, that work had brought him in contact with a number of relatively prominent persons who were prepared to testify about his good reputation for veracity. The description by these character witnesses of their associations with Lankford would have substantially disclosed to the jurors the nature of Lankford's work and the apparent

dedication with which he pursued it. Among those available as witnesses were a Congressman, a high official in the Department of State, a program director in the Department of Education, a pastor of a church, a former sheriff, a member of the County Board of Supervisors, and a businessman who, as the president of a church group, had done community work with Lankford.

Defense counsel chose not to use these available witnesses.

Thus, the prosecutor presented to the jury a defendant who could be described as a violent criminal, prone, as Mrs. Lankford testified, to excessive consumption of alcohol. There was no countervailing description of him as completely reformed and an effective social worker whose good reputation for veracity was well known to witnesses whose credentials should have been found impressive by the jury.

VI.

In instructing the jury, the trial judge did not define the elements of the crimes with which Lankford was charged, Class 3 felonies. He simply instructed the jury to convict if they found beyond a reasonable doubt that the defendant had accomplished the particular touching by force. Penetration was not mentioned, and force was undefined. Defense counsel made no request for more detailed instructions.

With respect to one of the cunnilingus counts, Mia testified that she was approached in a hallway as she was cleaning house. Lankford, she said, removed her jeans. As to the other cunnilingus count, she testified that Lankford removed her pajama pants. In neither case was there any suggestion of torn clothing, and the only evidence of force

was contained in her summary statements that the ultimate touchings were accomplished while, or though, she was trying to get away. Despite the dearth of evidence of force, the jury was not instructed that in the absence of threats or fear of harmful consequences from resistance, rape requires that a woman resist to the extent of her ability and that the force employed is that which suffices to overcome her resistance. Had the judge so defined rape and described a lesser included offense, the jury might have convicted Lankford of a lesser offense. It is readily understandable that defense counsel did not wish to make such an argument to the jury. His position was that no offense of any kind had been committed. That position would not have been undercut, however, by instructions from the judge clearly identifying the subsidiary findings necessary for an ultimate finding of guilt.

The jury fixed the punishment on each of the three counts at the ten year maximum, from which it is apparent that the jurors considered the acts they found to have occurred reprehensible. Nevertheless, no matter how reprehensible they thought the acts, a carefully instructed jury might have found that Mia did not offer the kind of resistance, and Lankford did not employ that degree of force, necessary to elevate the offenses to Class 3 felonies.

With respect to the fellatio count, the deficiencies in the charge are even more evident. Mia testified that Lankford placed his penis in her mouth and that the contact culminated in an ejaculation. A properly instructed jury would surely have wondered how penetration was achieved through defensive hands, tightened lips and clenched teeth and, even if penetration were achieved, why Mia permitted the contact to run its course when biting would have ended the offensive intrusion. There was no suggestion of coercion to

obtain submission or a low level of resistance. Indeed, defense counsel might have obtained an affirmative instruction that the proof was insufficient to support a finding that a third class felony had been committed.

Mia was sixteen and seventeen years old when the three assaults charged in the indictment were said to have been committed.

VII.

We need not consider whether any one of the deficiencies we have noted in the trial lawyer's performance would support a conclusion that his representation of Lankford was not within the range of competence required by *Marzullo* v. *Maryland*, 561 F.2d 540 (4th Cir. 1977). The deficiencies were present in combination. The lawyer went through the fruitless task of presenting witnesses to establish alibis for Lankford on two of the dates on which the offenses allegedly occurred. These alibis were not of substantial help because Mia was necessarily vague about precise dates, the alleged offenses having occurred more than two years before her testimony. On the other hand, he chose not to offer seemingly impressive character witnesses who could have enhanced Lankford's stature in the eyes of the jury and shored up his credibility. He also did nothing to uncover possible prejudices in the minds of prospective jurors, failed to rebut damaging circumstantial evidence presented by the state, and he did nothing to procure mitigating jury instructions.

The case boiled down to a swearing contest between Mia and Lankford. Defense counsel did all that reasonably might have been expected of him in attacking Mia's credibility, but did nothing to support Lankford's. At the habeas hearing, he testified that he thought testimony by friends

and associates concerning Lankford's good works would not be helpful, for it would not prove that Lankford did not commit the alleged assaults in the privacy of his home. He placed little or no value upon testimony about one's reputation for veracity. Testimony of good works and a solid reputation for truthfulness, however, might well have provided the credibility support that Lankford needed. The members of the jury knew that one guilty of such offenses has a strong incentive to lie about them, and strong testimony by impressive witnesses showing that Lankford was not the kind of person who might be expected to testify falsely might have moved the jury to accept him as a credible witness.

Save for his own contradiction of Mia's testimony, Lankford was left defenseless. He was without the cloak of respectability his good work since 1968 had earned him, and without the aid of the good reputation for truthfulness he had acquired. He was presented as a violent felon to a jury that had not been carefully screened, and the trial court's instructions left no chance that a convicting jury would find him guilty of anything less than three Class 3 felonies.

In these circumstances, we think the district judge properly concluded that the lawyer's performance did not meet *Marzullo* standards and correctly directed the conditional issuance of the writ.

AFFIRMED.

No. 83-871

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

O. S. FOSTER, Sheriff of Roanoke County Virginia, and ROBERT N. LANDON, Director, Virginia Department of Corrections,

Petitioners,

—v.—

CHARLES LANKFORD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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No. 83-871

In the

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RESPONDENT'S BRIEF IN OPPOSITION

REASONS WHY THE WRIT SHOULD BE DENIED

Under the Rules of this Court, there are two traditional reasons for the granting of a petition for writ of certiorari to a federal court of appeals: (1) the decision of the court below is in

conflict with the decision of another court of appeals on the same matter; (2) the case presents an important question of federal law which has not been, but should be, settled by this Court. Rule 17.1, Supreme Court Rules. Neither reason is presented in this case. The petition for writ of certiorari does not argue to the contrary. In fact, the petition does not even allude to either of those reasons as a basis for granting the writ.

The court below found that Lankford had been denied the effective assistance of counsel. In reaching that conclusion, the court applied a standard first articulated by this Court in McMann v. Richardson 397 U.S. 759 (1970) and later adopted by the Fourth Circuit in Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977), namely, was defense counsel's representation "within the

range of competence demanded of attorneys in criminal cases." App. 57. That standard, in one variation or another, has now commanded general acceptance by the circuit courts.

Petitioners do not argue that the Marzullo standard is, as a matter of constitutional interpretation, incorrect. Rather, they argue only that the standard has been misapplied to the facts of this case. Pet. at 7. However, misapplication of a standard widely accepted by the lower federal courts surely presents no issue warranting plenary review by this Court.

Even if it were appropriate for this Court to review a case merely because a concededly proper standard has been misapplied to the facts, this would not be an appropriate case for review. The unanimous conclusion of the court below that

Lankford had been denied effective assistance of counsel -- a conclusion reached after a thorough analysis of the prosecution's case and defense counsel's efforts to present a response -- is amply supported by the record. Assuming, as this Court said in McMann, that the Sixth Amendment requires reasonable competence of criminal defense counsel, it is apparent that Lankford received a constitutionally inadequate defense. As a result of the shortcomings in Lankford's defense that are described in the opinion of the court of appeals, he was "left defenseless." App. 62.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Counsel for Respondent

Dated: New York, New York
February 8, 1984